

1991

Private Market Solutions to the Savings and Loan Crisis: Bank Holding Company Acquisitions of Savings Associations

Lissa Lamkin Broome

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Lissa Lamkin Broome, *Private Market Solutions to the Savings and Loan Crisis: Bank Holding Company Acquisitions of Savings Associations*, 59 Fordham L. Rev. S111 (1991).

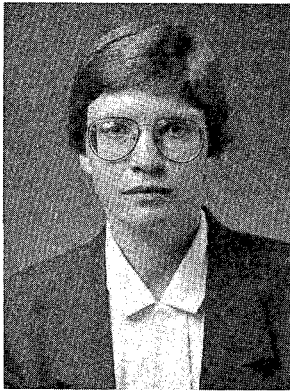
Available at: <https://ir.lawnet.fordham.edu/flr/vol59/iss6/6>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Private Market Solutions to the Savings and Loan Crisis: Bank Holding Company Acquisitions of Savings Associations

Cover Page Footnote

This project was supported by a grant from the University of North Carolina Law Center Foundation. I wish to thank Adam H. Broome, Alexander Donaldson, Anthony Gaeta, Jr., S. Elizabeth Gibson, Sidney A. Shapiro and Ty M. Votaw for their helpful suggestions and comments on earlier drafts of this Article. In addition, William M. Moore, Jr. and William Sibley provided helpful information and insights. Finally, I wish to acknowledge the able research assistance of Christina L. Goshaw and Christine M. Schilling.



PRIVATE MARKET SOLUTIONS TO THE SAVINGS AND LOAN CRISIS: BANK HOLDING COMPANY ACQUISITIONS OF SAVINGS ASSOCIATIONS

LISSA LAMKIN BROOME*

INTRODUCTION

MOST of the discussion and legislation relating to the savings and loan crisis has centered upon governmental intervention and bailout of failed or failing thrift institutions. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA")¹ continues this focus, but also contains important provisions facilitating a non-governmental, market solution to the savings and loan crisis by encouraging bank holding companies to purchase thrift institutions. The significance of the measures added by FIRREA to facilitate a private resolution of the savings and loan debacle has been overshadowed by the magnitude of the crisis and may have been overlooked as well because several of the crucial provisions were added late in the legislative process and with little fanfare. This Article focuses on this private, market solution to the savings and loan crisis, which, for a variety of factors, in addition to its relative lack of notoriety, has not been fully utilized.

When a thrift institution becomes insolvent, the government incurs substantial costs. The Resolution Trust Corporation ("RTC") is appointed to dispose of or "resolve" the failed institution.² In some cases, if the thrift has little going concern value, the RTC will arrange to pay

* © 1991. All rights reserved. This speech was given by Professor Broome as part of the annual Financial Institutions and Regulation Symposium at the Fordham University School of Law.

Associate Professor of Law, University of North Carolina School of Law. B.S. 1978, University of Illinois; J.D. 1981, Harvard Law School. This project was supported by a grant from the University of North Carolina Law Center Foundation.

I wish to thank Adam H. Broome, Alexander M. Donaldson, Anthony Gaeta, Jr., S. Elizabeth Gibson, Sidney A. Shapiro and Ty M. Votaw for their helpful suggestions and comments on earlier drafts of this Article. In addition, William M. Moore, Jr. and William Sibley provided helpful information and insights. Finally, I wish to acknowledge the able research assistance of Christina L. Goshaw and Christine M. Schilling.

1. Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified at various sections of 12 and 15 U.S.C.) [hereinafter FIRREA].

2. See 12 U.S.C. § 1441a(b) (Supp. I 1989); see generally Lofts, Querio & Jensen, *Financial Institutions Receiverships Before and After the Financial Institutions Reform, Recovery and Enforcement Act of 1989*, 45 Consumer Finance L.Q. Rep. 158 (1991).

depositors the amounts of their insured deposits and liquidate the thrift's assets.³ This form of resolution is generally quite costly when the liquidation value of the assets is substantially less than the amounts owed to the insured depositors.

If the thrift's going concern value is significant, the RTC will attempt to find a purchaser who is willing to purchase the assets of the failed thrift and assume its deposit liabilities.⁴ Although this form of resolution is normally far less costly than a payoff of all insured depositors, there is still substantial government expense. The RTC provides the purchaser with cash in the amount of the difference between the book value of the assets acquired and the amount of the liabilities assumed.⁵ For instance, in a recent purchase and assumption transaction arranged by the RTC, the acquiring institution purchased \$579 million of the failed thrift's assets, assumed deposit liabilities of \$1.43 billion, and received from the RTC a cash payment of \$859 million, representing the difference between the value of the assets purchased and the liabilities assumed.⁶ Further, the RTC gave the purchaser three months after the purchase to review the acquired assets and sell back to the RTC those assets found to be nonperforming or otherwise unsatisfactory.⁷ Estimates of the total cost of the thrift crisis vary, but shortly after FIRREA's enactment one observer predicted that the resolution of insolvent thrifts would cost the government \$166 billion.⁸

A private market solution to the S&L crisis is the statutory authority added by FIRREA enabling a bank holding company to purchase a solvent thrift institution. The infusion of bank holding company capital into a privately arranged purchase of a thrift, which might save the thrift from insolvency and ultimate resolution at taxpayer expense, is an important and significant method of reducing taxpayer costs associated with the savings and loan crisis.⁹ Since FIRREA's enactment, however, gov-

3. See Tucker, Meire & Rubinstein, *The RTC: A Practical Guide to the Receivership/Conservatorship Process and the Resolution of Failed Thrifts*, 25 U. Rich. L. Rev. 1, 39 (1990).

4. See *A Buyer's Guide: How to Purchase a Savings Association from the RTC*, [Current] Fed. Banking L. Rep. (CCH) ¶ 70,503, at 46,519 (Mar. 2, 1990); Zisman & Churchill, *Federal Assistance Relating to Failing and Failed Thrifts*, Banking Expansion Rep., Aug. 21, 1989, at 1.

5. See Strategic Plan for Resolution Trust Corporation, 54 Fed. Reg. 46,574, 46,576 (1989).

6. See R.T.C. Release, *Mercury Fed'l Savings and Loan Ass'n, Huntington Beach, Cal., Acquired by Security Pacific Corp., Los Angeles, Cal.* (Sept. 21, 1990), 1990 WL 203720 (RTC).

7. See *id.* (the RTC agreed to buy back from the purchaser assets subsequently found to have documentary deficiencies or specific defects).

8. MacRae, *Where's the Capital?* Bank Admin., November 1989, at 30.

9. Estimates of the total cost of the S&L crisis vary, but some suggest costs in the range of \$120 billion to \$150 billion, for a total of some \$300 billion when financing costs over 30 years are considered. See 47 Cong. Q. 2113 (Aug. 12, 1989). FIRREA provided that the government cost of resolving insolvent thrift institutions would be financed in part by the issuance of \$50 billion in 30-year bonds, with the Treasury paying the bond

ernment-assisted rather than private acquisitions of thrifts have predominated. Bank holding companies have announced private acquisitions of some \$10 billion in thrift assets,¹⁰ but have purchased over \$80 billion in thrift deposits in government-assisted transactions from the RTC.¹¹

Part I of this Article explores the efforts of bank holding companies to acquire the authority to purchase thrift institutions since 1977, including the 1982 legislative authorization of bank holding companies' purchases of insolvent thrift institutions under certain circumstances. Part II describes the statutes added by FIRREA relating to bank holding company acquisition of thrift institutions, including the Oakar Amendment, which permits a bank holding company to purchase a savings association and combine its operations with those of an existing bank subsidiary.¹²

Part III considers the business reasons motivating a bank holding company's purchase of a thrift institution and the advantages of an Oakar consolidation of the thrift with an existing bank. This part also evaluates bank holding company acquisitions of savings associations since FIRREA's enactment.¹³ Explanations are suggested for the great number of bank holding company acquisitions of insolvent thrifts compared with the number of insolvent thrift acquisitions that took place prior to FIRREA and compared with the number of bank holding company acquisitions of healthy thrifts since FIRREA.

In Part IV, the Article evaluates the goal of permitting bank holding companies to purchase solvent savings associations to attract bank holding company capital to the thrift industry.¹⁴ The goal of seeking a source of private capital for institutions that might otherwise fail and be disposed of at government expense is found to be worth the potential financial harm to bank holding company acquirers if the savings association acquisition proves to be less advantageous than anticipated. To further encourage the goal of attracting bank holding company capital to thrifts,

interest costs and making other payments to the deposit insurance fund as needed. See Scott, *Never Again: The S&L Bailout Bill*, 45 Bus. Law. 1883, 1884 (1990).

"If the capital required to strengthen and ensure the viability of healthy and sick thrifts cannot be attracted from the private sector, it will ultimately have to be furnished by the public sector." Weiss & Stock, *Now Is Time to Let Bank Firms Buy Healthy Thrifts*, Am. Banker, Apr. 5, 1989, at 4.

10. Data provided by SNL Securities, LP, Charlottesville, Virginia. The data includes transactions announced since the enactment of FIRREA through March 18, 1991, and does not include transactions that were announced but subsequently terminated during that time period [hereinafter SNL Securities].

11. See *id.*; Nagle, *Analyzing a Thrift Acquisition in Arizona*, Am. Banker, Oct. 24, 1990, at 13 ("Of \$94.7 billion in thrift assets changing ownership so far this year, 65% of those assets were acquired by banks."); see also Piro & Nagle, *Illinois Deals Perk Up Private Sector*, Am. Banker, Apr. 3, 1991, at 13 ("combined RTC and FDIC sales [of failed banks and thrifts] accounted for 70% of all assets targeted for acquisition by financial institutions [in the first quarter of 1991]").

12. See *infra* text accompanying notes 46-113.

13. See *infra* text accompanying notes 114-208.

14. See *infra* text accompanying notes 209-48.

the risks to bank holding company acquirers could be reduced and the factors identified as limiting solvent thrift acquisitions could be addressed. Part IV suggests that whether the current statutory and regulatory risks to bank holding company acquisitions of thrifts should be reduced is an area for further study, and proposes some modest changes in the Oakar Amendment and other statutory provisions to further encourage and attract bank holding company capital to solvent savings associations.

I. THE HISTORY OF BANK HOLDING COMPANY ACQUISITIONS OF THRIFT INSTITUTIONS

The Bank Holding Company Act of 1956¹⁵ provides that a bank holding company (a company that controls a bank)¹⁶ may own only bank subsidiaries and certain nonbanking subsidiaries whose activities are "so closely related to banking . . . as to be a proper incident thereto."¹⁷ The purpose of this limitation is to ensure the separation of banking from other commercial enterprises so that bank depositors' funds are not placed at risk by financing nonbanking activities.

Since 1977, if not earlier, bank holding companies have urged the Federal Reserve Board ("Board") to grant them the authority to purchase thrift institutions as nonbanking subsidiaries.¹⁸ Although bank holding companies were statutorily granted the authority to bid on insolvent thrifts in 1982, they were not allowed to purchase healthy thrift institutions until 1989 when Congress authorized such purchases in FIRREA.¹⁹ This Part sets forth the development of bank holding company efforts to purchase thrifts from 1977 until consideration of the FIRREA legislation.

A. *D.H. Baldwin*

In 1977, the Federal Reserve Board, the federal regulator charged with regulating bank holding companies and their nonbanking subsidiaries, concluded that although the activities of a thrift institution were closely related to banking, they were not a proper incident to banking, and declined to approve the D.H. Baldwin bank holding company's application to acquire a thrift institution.²⁰ The Federal Reserve Board gave three reasons for its finding. First, it was concerned about the regulatory conflict that might result from the affiliation of a bank holding company and

15. The Bank Holding Company Act is set forth at 12 U.S.C. §§ 1841-50 (1988 & Supp. I 1989).

16. See 12 U.S.C. § 1841(a)(1) (1988).

17. *Id.* § 1843(c)(8).

18. See D.H. Baldwin Co., 63 Fed. Res. Bull. 280, 280 (1977); *infra* text accompanying notes 20-45.

19. See *infra* text accompanying notes 61-74.

20. See D.H. Baldwin Co., 63 Fed. Res. Bull. 280, 281-82, 284, 287 (1977).

a thrift institution.²¹ Second, it feared the erosion of what it described as a beneficial institutional rivalry between banks and thrifts.²² Finally, the Board was worried that thrift acquisitions would undermine the Bank Holding Company Act's interstate banking restrictions.²³ The Bank Holding Company Act, in a provision referred to as the Douglas Amendment, prohibits a bank holding company from acquiring an additional bank subsidiary located in another state unless the laws of that state specifically allow out-of-state bank holding companies to purchase in-state banks.²⁴

In 1982, however, the Board approved applications by two bank holding companies to acquire failing thrift institutions.²⁵ The Board found in each case that the public benefits of preserving the savings and loan association "as a thrift competitor" outweighed the general adverse effects of the combination of a bank holding company and a thrift that it had cited in its 1977 *D.H. Baldwin* ruling.²⁶

B. *Garn-St Germain Act of 1982*

These approvals were followed shortly by the Garn-St Germain Depository Institutions Act of 1982,²⁷ which statutorily authorized bank holding company acquisitions of failing or failed thrift institutions in order to give the thrift deposit insurance fund ("FSLIC") greater flexibility in dealing with failed thrifts.²⁸ The statute established a priority scheme to aid FSLIC in selecting among the bidders for a failed thrift. The scheme gave priority to a bid from another thrift institution over a bid from a bank holding company.²⁹ The purpose of the bidding priority scheme is described in the statute as the maintenance of "specialized de-

21. See *id.* at 284-5. The Board noted, however, that the existence of a separate regulatory structure does not in and of itself indicate that Congress intended to prohibit common ownership of banks and thrifts. See also *id.* at 285 (discussing American Fletcher Corp., 60 Fed. Res. Bull. 868 (1974)).

22. See 63 Fed. Res. Bull. at 286.

23. See *id.* at 286-87.

24. See 12 U.S.C. § 1842(d) (1988).

25. See Citicorp, 68 Fed. Res. Bull. 656 (1982); Interstate Financial Corp., 68 Fed. Res. Bull. 316 (1982).

26. Interstate Financial Corp., 68 Fed. Res. Bull. at 317; accord Citicorp, 68 Fed. Res. Bull. at 663 app. These acquisitions may be justified as consistent with *D.H. Baldwin's* concern about possible reduction of competition because the purpose of permitting acquisitions of insolvent thrifts is "to restore the troubled thrift to health, thereby increasing competition between thrifts and commercial banks in the same markets." Helfer & Korn, *Thrift Acquisitions by Bank Holding Companies*, Banking Expansion Rep., Mar, 6, 1989, at 1.

27. The Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (1982) (current version codified in scattered sections of 12 U.S.C.).

28. See 12 U.S.C. § 1730a(m) (1988) (repealed 1989); S. Rep. No. 536, 97th Cong., 2d Sess. 1, reprinted in 1982 U.S. Code Cong. & Admin. News 3054, 3055. Other significant aspects of the Garn-St Germain Act relating to the expansion of thrift institution powers are discussed in Broome, *The Influence of Enhanced Thrift Institution Powers on Commercial Bank Market Expansion*, 67 N.C.L. Rev. 795, 802-04 (1989).

29. See 12 U.S.C. § 1730a(m)(3) (1988) (repealed 1989).

pository institutions."³⁰

In approving acquisitions pursuant to this statutory authority, the Federal Reserve Board imposed what it called "tandem operations restrictions."³¹ These restrictions precluded cross-marketing of bank subsidiary services to customers of the thrift subsidiary.³² These restrictions were imposed to alleviate concerns that bank holding companies' ownership of thrift institutions might result in unfair competition and conflicts of interest.³³ Moreover, the Garn-St Germain Act also provided that branches established by the thrift subsidiary of a bank holding company could only be located where a national bank could establish and operate a branch within that state.³⁴

C. *Exit Moratorium of the Competitive Equality Banking Act of 1987*

The legislative authorization of bank holding company acquisitions of failed thrifts expired in 1985,³⁵ was temporarily extended several times,³⁶ and was reinstituted on a permanent basis in the Competitive Equality Banking Act of 1987 ("CEBA").³⁷ CEBA also enacted a one-year moratorium on the exit of thrift institutions from the FSLIC insurance fund

30. *See id.* § 1730a(m)(3)(B).

31. *See* Michigan Nat'l Corp., 75 Fed. Res. Bull. 88 (1989). *See generally* Helfer & Korn, *supra* note 26 (these restrictions "mandate that the deposit-taking activities of the holding company's bank (and other) subsidiaries will not be linked to the thrift's accounts, and that the solicitation of loans and deposits for the thrift will be kept entirely separate from the loan and deposit solicitation for the holding company's other subsidiaries").

32. The restrictions imposed by the Board typically prohibited the operation of the thrift subsidiary in tandem with any other subsidiary of the bank holding company. *See, e.g.,* Michigan Nat'l Corp., 75 Fed. Res. Bull. 88, 89 (1989). Specifically, no banking subsidiary could link its deposit-taking activities to accounts at a thrift subsidiary in a sweeping arrangement, and no bank subsidiary could solicit deposits or loans for a thrift subsidiary. *See* 54 Fed. Reg. 15,806 (1989) (requesting comments on tandem operations restrictions for bank holding company-acquired thrifts).

33. 54 Fed. Reg. 37,297, 37,300 (1989).

34. *See* 12 U.S.C. § 1730a(m)(5)(A) (1988) (repealed 1989). The Federal Reserve Board restricted thrifts acquired by banks to branching only in locations in which national and state-chartered banks located in the same state could establish branches. *See* Barnett Banks, Inc., 75 Fed. Res. Bull. 82, 89 (1980) (limiting thrift to bank branching in order to "minimize the impact of bank holding company thrift acquisitions on the authority of a state to limit the expansion of financial institutions within its borders").

The Garn-St Germain Act amended the Bank Holding Company Act's definition of "bank" to exclude thrifts that might have otherwise been included in the previous definition as institutions accepting demand deposits and making commercial loans. *See* The Garn-St Germain Act of 1982, Pub. L. No. 97-320, § 333, 96 Stat. 1469, 1504 (amending 12 U.S.C. § 1841(c)); *see* Broome, *supra* note 28, at 838-39.

35. The Garn-St Germain Act of 1982, Pub. L. No. 97-320, § 141(a)(7), 96 Stat. at 1489 (expired Oct. 15, 1985).

36. *See* Act of Aug. 27, 1986, Pub. L. No. 99-400, § 1(a), 100 Stat. 902, 902; Act of Oct. 8, 1986, Pub. L. No. 99-452, § 1(c), 100 Stat. 1140, 1140 (1986).

37. *See* Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 509(a), 101 Stat. 552, 635 [hereinafter CEBA]. The Board approved applications by bank holding companies to acquire failing thrifts under its general authority to approve acquisitions of nonbanking institutions after the Garn-St Germain Act authority had expired and before

for the purpose of conversion to bank charters and FDIC insurance, and acquisition by a bank holding company.³⁸ The moratorium was enacted to prevent bank holding companies from acquiring healthy thrift institutions by arranging for the target thrift to convert to a bank charter so that it could subsequently be acquired by the bank holding company as an additional bank subsidiary.³⁹ Of obvious concern to Congress was the resulting loss of FSLIC deposit insurance premiums at a time when the financial condition of the FSLIC deposit insurance fund was in serious jeopardy.⁴⁰ The CEBA exit moratorium was originally set to expire in August of 1988, but was extended for an additional year, which expired coincident with the passage of FIRREA in August 1989.⁴¹

D. *Proposed Federal Reserve Board Regulatory Revision*

In the meantime, the Federal Reserve Board reconsidered the continuing validity of its 1977 *D.H. Baldwin* ruling and in September 1987 asked for comments on a proposed regulatory revision that would sanction the acquisition and operation of a thrift institution by a bank holding company as an activity that was closely related to banking and a proper incident thereto.⁴² The Board explained that statutory changes in the Garn-St Germain Act granting thrifts more bank-like powers reduced its concerns about regulatory conflict and diminished institutional rivalry between commonly owned banks and thrifts.⁴³ The Board also noted that its concern about undermining the Douglas Amendment had been lessened as more states enacted statutes permitting interstate banking consistent with the Douglas Amendment's terms.⁴⁴ Before the Federal Reserve

the CEBA authority was enacted. See *Ranier Bancorporation*, 72 Fed. Res. Bull. 666, 667 (1986).

38. See CEBA, *supra* note 37, at § 306(h), 101 Stat. 552 (codified at 12 U.S.C.A. § 1730) (repealed 1989). See generally Breyer, *Thrift Rescue Bill Will Open Acquisition Doors*, Am. Banker, June 13, 1989, at 4 (prior to CEBA "a number of institutions . . . applied for and completed conversions to FDIC-insured status").

39. See Doyle & DeSimone, *Bank Holding Company Acquisitions of Savings Associations Under FIRREA*, Issues in Bank Reg., Winter 1990, at 16.

40. Helfer & Korn, *supra* note 26 ("The Bank Board's goal of strengthening the FSLIC fund through bank holding company acquisitions of troubled thrifts is threatened by the acquiror's ability to convert their subsidiary thrifts into FDIC-insured institutions once the current moratorium on exits from the FSLIC system expires.").

41. See Pub. L. No. 100-378, § 10, 102 Stat. 889 (codified at 12 U.S.C.A. § 1730) (repealed 1989).

42. See 52 Fed. Reg. 36,041, 36,045 (1987). The Federal Reserve board subsequently reported that over 70% of the comments that it received on its proposed regulatory revision favored allowing bank holding companies to acquire healthy thrift institutions. See 54 Fed. Reg. 37,297, 37,298 (1989). On April 19, 1989, the Federal Reserve Board asked for public comments on whether the tandem operations restrictions should be "retained, modified, or removed." 54 Fed. Reg. 15,806, 15,807 (1989).

43. See 52 Fed. Reg. 36,041, 36,045 (1987); see also Broome, *supra* note 28, at 838-49 (urging Congress to examine the continuing validity of the *D.H. Baldwin* ruling, which provides, as a general matter, that the acquisition of a thrift institution was not a proper incident to banking and therefore not a proper activity for a bank holding company).

44. See 52 Fed. Reg. 36,041, 36,045 (1987). At the time of the *D.H. Baldwin* ruling,

Board issued a final rule, however, Congress passed FIRREA, which statutorily authorized bank holding companies to acquire savings associations pursuant to their authority to acquire nonbanking subsidiaries.⁴⁵

II. FIRREA PROVISIONS

In February and March 1989, shortly after President Bush took office, companion bills were introduced in the Senate and House by the Bush Administration addressing the savings and loan crisis.⁴⁶ The House and Senate held hearings on the Administration's bill.⁴⁷ Each then passed a different version of the original proposed legislation.⁴⁸ The House and Senate differences were worked out in a Conference Committee.⁴⁹ The Conference Committee's bill, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, was passed by the House and Senate in August, and became effective when President Bush signed it on August 9, 1989.⁵⁰

The 400-page bill made many significant changes in the regulation of thrift institutions.⁵¹ A new, "politically correct," term for beleaguered savings and loans was introduced. FIRREA defined "savings associa-

no states had enacted statutes enabling interstate acquisitions pursuant to the Douglas Amendment. At the time of the proposed rulemaking, however, the Board noted that interstate banking was "widespread." *See id.*

45. *See* FIRREA, *supra* note 1, § 601, 12 U.S.C. § 1843(i) (Supp. I 1989).

46. *See* S. 413, 101st Cong., 1st Sess. (1989); H. R. 1278, 101st Cong., 1st Sess. (1989).

47. *See, e.g., Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (H.R. 1278), Part 2: Hearings on H.R. 1278 Before the Subcomm. on Financial Institutions, Supervision, Regulation, and Insurance of the House Comm. on Banking, Finance and Urban Affairs, 101st Cong., 1st Sess. (1989); Problems of the Federal Savings and Loan Insurance Corporation (FSLIC), Part IV: Hearings on S. 413 Before the Senate Comm. on Banking, Housing, and Urban Affairs, 101st Cong., 1st Sess. (1989); Problems of the Federal Savings and Loan Insurance Corporation (FSLIC), Part III: Hearings on S. 413 Before the Senate Comm. on Banking, Housing, and Urban Affairs, 101st Cong., 1st Sess. (1989); Administration's Plan to Resolve the Savings & Loan Crisis: Hearings Before the House Comm. on Banking, Finance and Urban Affairs, 101st Cong., 1st Sess. (1989); Problems of the Federal Savings and Loan Insurance Corporation (FSLIC), Part II: Hearings on S.413 Before the Senate Comm. on Banking, Housing, and Urban Affairs, 101st Cong., 1st Sess. (1989).*

48. The Senate version passed on April 19, 1989, *see* 135 Cong. Rec. S4304 (daily ed. Apr. 19, 1989), and was accompanied by S. Rep. No. 19, 101st Cong., 1st Sess. (1989). The House version passed on June 15, 1989, *see* 135 Cong. Rec. H2803 (daily ed. June 15, 1989), and was accompanied by H.R. Rep. No. 54, 101st Cong., 1st Sess., *reprinted in* 1989 U.S. Code Cong. & Admin. News 86.

49. *See* H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 393, *reprinted in* 1989 U.S. Code Cong. & Admin. News 432.

50. 135 Cong. Rec. H5315 (daily ed. Aug. 4, 1989); 135 Cong. Rec. S10,214 (daily ed. Aug. 4, 1989).

51. *See generally* Clark, Murtagh & Corcoran, *Regulation of Savings Associations Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989*, 45 Bus. Law. 1013 (1990); Gail & Norton, *A Decade's Journey From "Deregulation" to "Supervisory Reregulation": The Financial Institutions Reform, Recovery, and Enforcement Act of 1989*, 45 Bus. Law. 1103 (1990); Wittie & Laird, *The Financial Institutions Reform, Re-*

tions" to include federally chartered savings and loan associations and savings banks, and state-chartered savings and loan associations.⁵² The regulatory structure for savings associations was revamped with the creation of the Office of Thrift Supervision ("OTS") supervised by the Department of Treasury.⁵³ The deposit insurance system was also reorganized. The FSLIC was abolished, and the Federal Deposit Insurance Corporation ("FDIC"), which previously provided deposit insurance only for banks, was directed to create and regulate two separate deposit insurance funds—the Bank Insurance Fund ("BIF") to insure the deposits of banks and the Savings Association Insurance Fund ("SAIF") to insure the deposits of savings associations that had formerly been insured by FSLIC.⁵⁴ The RTC was also created to resolve failed savings associations.⁵⁵

In addition to changes in the regulatory structure, FIRREA made numerous substantive changes in the statutes regulating the activities of savings associations in an effort to eliminate some of the problems and abuses that may have lead to the thrift crisis.⁵⁶ Of importance to this Article are three FIRREA provisions relating to bank holding company acquisitions of savings associations.⁵⁷ First, FIRREA amended the Bank Holding Company Act to authorize bank holding companies to purchase healthy savings associations, a power that bank holding companies had sought since at least 1977.⁵⁸ Second, FIRREA provided a mechanism—the so-called Oaker Amendment—by which a bank holding company could consolidate a savings association that it purchased with one of its existing bank subsidiaries.⁵⁹ Third, FIRREA eliminated the bidding scheme for failed savings associations that gave priority to other thrift institutions over bank holding companies.⁶⁰

covery and Enforcement Act of 1989: An Overview, 44 Consumer Finance L.Q. Rep. 83 (1991).

52. See FIRREA, *supra* note 1, § 204(b), 12 U.S.C. § 1813(b) (Supp. I 1989).

53. See *id.* § 301, 12 U.S.C. § 1462a.

54. See *id.* § 211(3), 12 U.S.C. § 1821(a)(5) & (6).

55. See *id.* § 501(a), 12 U.S.C. § 1441a(b)(1).

56. See Comizio, *FIRREA: New Provisions Affect Structuring, Powers and Activities of Savings Associations*, 44 Consumer Fin. L.Q. Rep. 155 (1990); Scott, *supra* note 9, at 1984-97.

57. See generally Sheehan, Sweet & Van Cleef, *Bank Holding Company Acquisitions of Thrifts Post-FIRREA*, in Thrift Mergers and Acquisitions After FIRREA Including Bank Holding Company Acquisitions of Thrifts 595 (1990); Buchman, *Charter Conversions, Branch Sales, and Bank and Bank Holding Company Acquisitions of Thrifts: A Post-FIRREA Guide*, in Impact of the Thrift Reform Act and the Future of the Thrift Industry 175 (1990); Comizio, *Post-FIRREA "Cross-Industry" Depository Institution Transactions: Current Regulatory Issues in Industry Consolidation*, 45 Consumer Fin. L.Q. Rep. 275 (1991). Doyle, DeSimone & Frohlich, *Acquisitions of Thrift Institutions by Bank Holding Companies*, in Impact of the Thrift Reform Act and the Future of the Thrift Industry 197 (1990).

58. See *infra* text accompanying notes 61-74.

59. See *infra* text accompanying notes 75-97.

60. See *infra* text accompanying notes 105-13.

A. *Bank Holding Company Acquisitions of Solvent Savings Associations*

Title VI of FIRREA, referred to as the thrift acquisition enhancement provisions, amends the Bank Holding Company Act to provide that the Federal Reserve Board may approve an application by a bank holding company to acquire a savings association (solvent or insolvent) as a non-banking subsidiary.⁶¹ The purpose of this amendment was "to attract additional private capital to the thrift industry."⁶²

The original Administration bill provided that bank holding companies could acquire healthy thrift institutions, but not until two years after the bill's enactment.⁶³ This waiting period was proposed because it was feared that bank holding companies would not bid for failed thrifts if authorized to acquire healthy thrifts.⁶⁴ Two years was thought to be a sufficient time period to allow the government to dispose of its inventory of failed institutions. The waiting period was eliminated, however, because of the urgent need to attract private capital to the thrift industry.⁶⁵

FIRREA precludes the Federal Reserve Board from imposing any restrictions on transactions between the savings association and its holding company affiliates, other than the general affiliate transaction restrictions set forth in the Federal Reserve Act.⁶⁶ The elimination of the tandem operations restrictions on thrifts acquired by bank holding companies was viewed as essential to fulfilling the goal of attracting bank holding

61. See FIRREA, *supra* note 1, at § 601(a), 12 U.S.C. § 1843(i) (Supp. I 1989). See generally Pringle, *Thrift Acquisition Opportunities for Banks and Bank Holding Companies Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989*, 44 Consumer Fin. L.Q. Rep. 200 (1990); Mitchell, *Thrift Acquisitions After FIRREA (Part I)*, N.Y.L.J. Mar. 28, 1990, at 3.

62. H.R. Conf. Rep. No. 222, *supra* note 49, at 422, reprinted in 1989 U.S. Code Cong. & Admin. News at 461; accord H.R. Rep. No. 54, *supra* note 48, at 449, reprinted in 1989 U.S. Code Cong. & Admin. News at 245.

63. See S. 413, 101st Cong., 1st Sess. § 601, 135 Cong. Rec. S1535 (daily ed. Feb. 22, 1989).

64. See Weiss & Stock, *supra* note 9 ("The two-year delay obviously is intended to encourage bank holding companies to purchase failing thrifts rather than healthy ones, at least during the next couple of years when there will be many sick institutions on the selling block.").

65. H.R. Rep. No. 54, *supra* note 48, at 374-75, reprinted in 1989 U.S. Code Cong. & Admin. News at 170. The House Committee's report explained that the "infusion of private capital into the thrift industry must proceed as quickly as possible." *Id.* at 449, reprinted in 1989 U.S. Code Cong. & Admin. News at 245; see 52 Banking Rep. (BNA) 863 (1989) (House Financial Institutions Supervision, Regulation, and Insurance Subcommittee of the House Banking Committee adopted an amendment offered by Reps. Mary Rose Oakar and Stan Parris to permit bank holding companies to acquire healthy thrifts upon the bill's enactment); 52 Banking Rep. (BNA) 776 (1989) (technical amendments drafted by the Administration were proposed on March 27, 1989, to allow immediate acquisitions of savings associations).

66. See FIRREA, *supra* note 1, § 601(a)(i)(2), 12 U.S.C. § 1843(i)(2) (Supp. I 1989); *id.* § 301, 12 U.S.C. § 1468 (Supp. I 1989). The Board must remove any tandem operations restrictions on any approvals of bank holding company acquisitions of thrift institutions granted prior to FIRREA. *Id.* § 601(b), 12 U.S.C. § 1843 note (modification of prior approvals).

company capital to the thrift industry. The restrictions previously imposed on bank holding companies operating failed thrifts eliminated most possible synergies from the bank holding company-thrift combination. Many believe these restrictions accounted for the relatively few bank holding company acquisitions of failed thrifts since the initial statutory authorization of such acquisitions in 1982.⁶⁷ After FIRREA, opportunities for cross-marketing of bank services to savings association customers are available, as are opportunities to use funds from one depository institution subsidiary to aid activities conducted in another depository institution subsidiary.⁶⁸

In Title II of FIRREA, Congress amended the Federal Deposit Insurance Act to provide that, as a general matter, no savings association may convert from the savings association deposit insurance fund (SAIF) to the bank deposit insurance fund (BIF) during the five-year period following the enactment of FIRREA.⁶⁹ The deposit insurance conversion moratorium was designed to ensure that the thrift deposit insurance fund was not deprived of premiums from thrift institutions that might elect to convert to a bank charter. At the end of the insurance conversion moratorium, a savings association may convert from SAIF to BIF only upon the payment of exit fees to SAIF and entrance fees to BIF.⁷⁰

67. See Belew, *The Thrift Rescue Law Presents Vital Cross-Marketing Opportunities*, J. Retail Banking, Fall 1989, at 41, 41 (prior to FIRREA "S&L[s] could not share back-office operations or be included in joint marketing efforts" with their bank holding company parents. "Neither could the S&L sell products, such as credit cards, originated in the holding company or its affiliates."); Pringle, *supra* note 61, at 200 ("substantial limitations placed by the FRB on the activities . . . of the thrifts post-acquisition by a bank holding company [prior to FIRREA] substantially diminished the benefits of acquisition"); Weinstein, *Results Are Mixed at Citicorp Thrifts*, Am. Banker, Mar. 27, 1989, at 1 (Citicorp has been hindered by tandem operations restrictions).

68. FIRREA provides that transactions between the savings association subsidiary and other subsidiaries of the bank holding company are limited only by the Federal Reserve Act's affiliate transaction rules, which exclude transactions between sister banks, including transactions between a bank subsidiary and a savings association subsidiary of the same bank holding company. See FIRREA, *supra* note 1, § 301, 12 U.S.C. § 1468(a)(2) (Supp. I 1989).

69. See *id.* § 206(7), 12 U.S.C. § 1815(d)(2); H.R. Rep. No. 54, *supra* note 48, at 411-12, reprinted in U.S. Code Cong. & Admin. News at 207-08 ("this moratorium is necessary to insure that those institutions that have benefitted from having a savings and loan charter pay their fair share of the bailout to provide for a stable and increased premium income to reduce the amount of taxpayer funds ultimately needed to resolve the crisis").

70. See *id.* § 206(7), 12 U.S.C. § 1815(d)(2)(E) & (F); 56 Fed. Reg. 29,893 (1991) (to be codified at 12 C.F.R. § 312.2); see also Vartanian, Ansell & Rockford, *Thrift Acquisitions: Sorting Through the Deposit Insurance Confusion*, Banking L. Rev., Winter 1990, 13, 14 ("Entrance fees are intended to offset dilution to an insurance fund resulting from an increase in deposits insured by that fund, while exit fees compensate an insurance fund for the loss of deposits and the attendant loss of premium income derived from those deposits.").

There are two exceptions to the deposit insurance conversion moratorium: (1) an insubstantial deposit transfer, see *infra* text accompanying notes 100-04; and (2) a consolidation of a bank and an insolvent savings association in an emergency acquisition, see *infra* text accompanying notes 111-13.

A bank holding company that acquires a solvent savings association pursuant to the authorization in FIRREA must conform the savings association's activities to those permissible for a nonbanking subsidiary of a bank holding company.⁷¹ As a practical matter, this means that some insurance and real estate development activities that the savings association may have been statutorily authorized to perform by its chartering authority may not be performed by that same savings association if it is controlled by a bank holding company.⁷²

The Douglas Amendment to the Bank Holding Company Act does not limit the location of the savings association subsidiary because it only applies to a bank holding company's acquisition of a "bank" subsidiary, and the Bank Holding Company Act's definition of "bank" explicitly excludes savings associations.⁷³ Thus, a bank holding company may acquire a savings association located in a state where it might not be able to acquire a bank subsidiary.⁷⁴

71. See 12 U.S.C. § 1843(c)(8) (Supp. I 1989) (a nonbanking subsidiary of a bank holding company may engage in those activities that the Federal Reserve Board has found to be closely related to banking and a proper incident thereto); 12 C.F.R. § 225.25(b)(9) (1991); 54 Fed. Reg. 37,297, 39,300 (1989).

72. See Doyle & DeSimone, *supra* note 39. In this sense, a savings association owned by a bank holding company is a hybrid thrift institution in that its thrift powers are limited by the nonbanking limitations of the Bank Holding Company Act.

73. See 12 U.S.C. § 1842(d) (1988). "Bank," for purposes of the Bank Holding Company Act and its Douglas Amendment, is defined to exclude an "insured institution" as defined in section 1841(j). See 12 U.S.C. section 1841(c)(2)(B) (1988). An "insured institution" includes a federally chartered savings association, federally chartered savings bank, state savings association insured by the SAIF, and a savings bank deemed by the OTS to be a savings association pursuant to section 1467a(l). See § 1841(j) (Supp. I 1989).

74. Once a bank holding company acquires a savings association, however, it becomes a savings and loan holding company. See 12 U.S.C. § 1467a(a)(1)(D) (Supp. I 1989). Thus, further savings association acquisitions are subject to the geographic limitations of the Savings and Loan Holding Company Act. See 12 U.S.C. § 1467a(e)(3) (Supp. I 1989). That Act was amended by the Competitive Equality Banking Act of 1987 to provide a Douglas Amendment-like counterpart for the acquisitions of additional thrift institutions. See CEBA, *supra* note 37, at § 104(g), 12 U.S.C. § 1467a(e)(3) (Supp. I 1989). Subsequent acquisitions by a bank holding company of savings associations must be consistent with the Savings and Loan Holding Company Act and the state laws of the state of the savings association target. See 12 U.S.C. § 1467a(e)(3) (Supp. I 1989).

FIRREA does not expressly address the branching rights of a savings association acquired by a bank holding company in a nonemergency acquisition. See Doyle & DeSimone, *supra* note 39. The absence of any specific statutory guidance strongly suggests that a thrift subsidiary of a bank holding company may branch to the extent that the thrift could branch absent bank holding company ownership. Moreover, one of the tandem operation restrictions frequently imposed by the Federal Reserve Board on acquisitions of failed thrifts by bank holding companies prior to FIRREA was the limitation of branches of the acquired thrift to those branches that might be established by a national bank. The removal of the tandem operations restrictions also suggests that Congress did not intend to limit the branching opportunities of a savings association acquired by a bank holding company. The Federal Reserve Board's view is that "savings associations acquired by bank holding companies [should] be permitted to branch to the extent permitted other savings associations located in the same home state." 54 Fed. Reg. 37,297, 37,301 (1989).

B. *The Consolidation of a Savings Association and a Bank Subsidiary of a Bank Holding Company*

A "major tenet" of the legislation accompanying the House Report on FIRREA was "a commitment to maintain a separate and viable industry charged with promoting home ownership."⁷⁵ The House Report also identified as a "critical factor in achieving the government's housing goal . . . the existence of a safe, efficient and viable thrift industry."⁷⁶ The Conference Committee's Report accompanying the version of the bill that was enacted, however, set forth a more general legislative goal of "promot[ing] through regulatory reform a safe and stable system of affordable housing finance."⁷⁷ Preservation of a separate and independent thrift industry was not set forth as a purpose of the legislation.

This change in focus of FIRREA's purpose is also evidenced by the Conference Committee's addition of the Oakar Amendment to the Federal Deposit Insurance Act.⁷⁸ This amendment permits a bank holding company that acquires a savings association to consolidate the savings association with an existing bank subsidiary of the bank holding company.⁷⁹ The original Administration bill did not provide for consolidation of a solvent savings association subsidiary purchased by a bank holding company with a bank subsidiary of the holding company.⁸⁰ The Administration apparently believed that the five-year deposit insurance conversion moratorium prevented charter conversions as well as insurance fund conversions.

Given the potential significance of the Oakar Amendment, it is interesting that it entered into the FIRREA legislation during the Conference Committee deliberations, late in the legislative process, and with little attention.⁸¹ The Amendment was neither described in nor commented

75. H.R. Rep. No. 54, *supra* note 48, at 309, *reprinted in* 1989 U.S. Code Cong. & Admin. News at 105.

76. *Id.* at 294, *reprinted in* 1989 U.S. Code Cong. & Admin. News at 90.

77. H.R. Conf. Rep. No. 222, *supra* note 49, at 393, *reprinted in* 1989 U.S. Code Cong. & Admin. News at 432. This goal was also enunciated in the earlier report issued by the House Banking Committee. *See* H.R. Rep. No. 54, *supra* note 48, at 410, *reprinted in* 1989 U.S. Code Cong. & Admin. News at 206.

78. Apparently, as originally proposed, the Oakar Amendment was to be attached to the thrift acquisition enhancement provisions amending the Bank Holding Company Act. In the Conference Committee, the amendment was moved to the Federal Deposit Insurance Act where it was an amendment to the insurance conversion moratorium provisions.

79. *See* FIRREA, *supra* note 1, § 206(a)(7), 12 U.S.C. § 1815(d)(3) (Supp. I 1989). The statute provides that notwithstanding the five-year insurance conversion moratorium, "any bank holding company that controls any savings association may merge or consolidate the assets and liabilities of such savings association with, or transfer such assets and liabilities to, any subsidiary bank which is a Bank Insurance Fund member." *Id.*

80. Consolidation of a savings association and a bank subsidiary was permitted only if the savings association was acquired in an emergency acquisition. *See infra* text accompanying notes 111-13.

81. *See* Garsson, *House May Seek to Let Banks Convert Acquired S&Ls Sooner*, Am. Banker, July 20, 1989, at 1 (predicting that "a number of measures—including the Oakar

upon in the Conference Committee report.⁸² Although the trade press was aware of the Oakar Amendment's consideration and gave it some coverage,⁸³ it is nonetheless highly unlikely that many Congressmen understood that it was included in FIRREA or realized the scope of its potential effect.⁸⁴

The purpose of the Oakar Amendment was to attract more capital to thrifts from bank holding companies by allowing bank holding company acquirors to gain the operational efficiencies of combining the thrift assets and deposits with those of an existing bank subsidiary.⁸⁵ Representative Oakar described her amendment as one that would benefit the government by encouraging bank holding companies to purchase thrifts, which might fail and have to be disposed of at government expense if they were not purchased.⁸⁶ Thus, the purpose of the Oakar Amendment seems consistent with the general purpose of the thrift acquisition enhancement provisions to attract bank holding company capital to savings associations.

Although the basic premise of the five-year moratorium on deposit in-

Amendment—could be added to the bill with little debate among [Conference] committee members"). The Oakar Amendment was drafted with the assistance of a bank holding company trade group and a law firm assisting it in its efforts. See Doyle & DeSimone, *supra* note 39 ("Arnold & Porter and The Secura Group participated with several bank holding companies and the Coalition of Regional Banks in the drafting of what ultimately became the Oakar Amendment."); Rehm, *Farmer, Fitzgerald Are Main Boosters of Oakar Proposal*, Am. Banker, Aug. 10, 1989, at 4. Although the amendment was not proposed until the Conference Committee's deliberations, Representative Oakar indicated that she had worked on the amendment for some six months. *Id.*

82. See H.R. Conf. Rep. No. 222, *supra* note 49, reprinted in 1989 U.S. Code Cong. & Admin. News at 432.

83. See, e.g., Garsson, *supra* note 81, at 1.

84. As Representative Shumway commented,

the conference turned out to be a fiasco. The Members had very little input in the decisions that were made there. Many things were inserted by staff without contemplation or discussion at all, and even to this day I think there were many of us who served on that conference who do not know what is contained in the conference report, and we have not had a chance to see it or review the notes of staff.

135 Cong. Rec. H4966 (daily ed. Aug. 3, 1989); see also 135 Cong. H5003 (daily ed. Aug. 3, 1989) (statement of Rep. Bunning) ("I didn't sign the Conference Report, because . . . I didn't get the chance to participate. One hundred two conferees were appointed and no progress was made until the 4 principals went behind closed doors.").

85. See 135 Cong. Rec. H4970 (daily ed. Aug. 3, 1989) (statement of Rep. Oakar). The purpose of the Oakar Amendment is to "provide much-needed incentives for the banking industry to consider acquisitions of thrifts, which in our recent memory, they have not been inclined to do." *Id.* The amendment's incentive is the "ability to consolidate a savings association into an existing bank subsidiary that produces cost efficiencies which can make the acquisition viable in bottomline terms." *Id.*; see also 135 Cong. Rec. H4986 (daily ed. Aug. 3, 1989) (statement of Rep. Hiler) ("To stimulate investment [in thrifts] by bank holding companies, the bill encourages the integration of acquired thrifts into the holding company operations."); Garsson, *supra* note 81 (absent the Oakar Amendment, "banks saw no benefits to buying thrifts'") (quoting a lobbyist for The Secura group).

86. See 135 Cong. Rec. H4970 (daily ed. Aug. 3, 1989) (statement of Rep. Oakar).

surance fund conversions was maintained in FIRREA, the Oakar Amendment permits charter conversions on the condition that the bank into which the savings association is merged pays federal deposit insurance premiums to both BIF and SAIF.⁸⁷ The deposit insurance premium amounts are allocated on the basis of a formula provided in the statute for deposit insurance assessments by SAIF on deposits attributable to the former savings association.⁸⁸ Upon the expiration of the five-year insurance conversion moratorium, the bank may convert the former savings association's deposits to BIF insurance upon the payment of exit and entrance fees for the deposits converted from SAIF to BIF.⁸⁹ It thus appears that Congress, in enacting the insurance conversion moratorium, while allowing the Oakar consolidation of a savings association and a bank, was concerned with protecting the financial integrity of the SAIF deposit insurance fund rather than with preservation of a separate and independent thrift industry.⁹⁰

The Oakar Amendment contains several other conditions in addition to the required allocation of deposit insurance premiums between SAIF and BIF.⁹¹ The Oakar combination must be approved by the federal banking agency charged with supervision of the resulting bank and by

87. See FIRREA, *supra* note 1, § 206(a)(7), 12 U.S.C. § 1815(d)(3)(B) (Supp. I 1989).

88. See *id.* § 206(a)(7), 12 U.S.C. § 1815(d)(3)(C). Essentially, the resulting bank pays SAIF insurance on the savings association's deposits, which are assumed to grow at a rate equal to the greater of seven percent annual growth or the annual rate of growth of deposits of the subsidiary bank minus the amount of any deposits acquired through the merger process. See *id.* The deposit amount is adjusted twice a year for computation of deposit insurance premiums. This aspect of the Oakar Amendment has been criticized because it assumes a seven percent minimum annual growth rate of the savings association's deposits. In reality, many savings associations may have declining deposits. Part of the impetus behind this assumed rate of deposit growth may have been to guarantee the SAIF insurance fund an expanding assessment base. See Garsson, *supra* note 81, at 1.

89. See FIRREA, *supra* note 1, § 206(a)(7), 12 U.S.C. § 1815(d)(3)(G) (Supp. I 1989). "Entrance fees are intended to offset dilution to an insurance fund resulting from an increase in deposits insured by that fund, while exit fees compensate an insurance fund for the loss of deposits and the attendant loss of premium income derived from those deposits." Vartanian, Ansell & Rockford, *supra* note 70, at 14.

90. See 135 Cong. Rec. H4971 (daily ed. Aug. 3, 1989) (statement of Rep. Oakar) (pointing out that no deposit insurance premiums would be removed from SAIF as the result of a thrift's consolidation with a bank pursuant to the Oakar Amendment).

91. The bank resulting from the merger of the savings association into the bank subsidiary has the powers accorded by the bank's chartering authority. See Doyle & DeSimone, *supra* note 39. But see 56 Fed. Reg. 20,520 (1991) (to be codified at 12 C.F.R. § 333.33) (The FDIC issued a final rule that savings associations that convert to SAIF-member state banks are subject to various regulatory restrictions imposed upon savings associations in FIRREA. It is not clear whether the FDIC intends to apply this new rule to state banks resulting from Oakar transactions that pay deposit insurance premiums to both BIF and SAIF. In any event, saving associations consolidating with national banks are not subject to the rule.).

The bank's location must be consistent with the Douglas Amendment, and unless the savings association was acquired by the bank holding company in an emergency acquisition, see *infra* note 111, the branches of the bank subsidiary must comply with appropriate state or federal bank branching restrictions. See 135 Cong. Rec. S10,200 (daily ed. Aug. 4, 1989) (statement of Sen. Wirth) (banks that result from a conversion transaction

the Federal Reserve Board.⁹² In addition, the Oakar Amendment provides that the Federal Reserve Board may not approve the merger unless at the time of the proposed transaction the aggregate amount of the assets of all depository institution subsidiaries of the acquiring bank holding company is not less than 200 percent of the total assets of the target savings association.⁹³ Upon consummation of the proposed transaction, the bank holding company and all bank subsidiaries of the bank holding company must meet all applicable capital standards.⁹⁴ The transaction must not be in substance the acquisition of a BIF member bank by a SAIF member bank.⁹⁵ Finally, the proposed transaction must comply with the Douglas Amendment to the Bank Holding Company Act, assuming that at the time of the transaction the savings association is a state bank that the bank holding company wishes to acquire.⁹⁶ The Conference Committee's report offers no explanation of these conditions.

Prior to August 9, 1991, a bank holding company could not enter into an Oakar transaction with a savings association having tangible capital of more than five percent during the preceding quarter.⁹⁷ The Conference

may not retain branches that violate state branching laws); 135 Cong. Rec. H4980 (daily ed. Aug. 3, 1989) (statement of Rep. Leach) (same).

92. See FIRREA, *supra* note 1, § 206(a)(7), 12 U.S.C. § 1815(d)(3)(A) (Supp. I 1989). If a state-chartered institution is involved in an Oakar consolidation, the approval of the appropriate state regulatory authority is also necessary. See Doyle & DeSimone, *supra* note 39.

93. See 12 U.S.C. § 1815(d)(3)(E)(i) (Supp. I 1989). This provision was added to Rep. Oakar's original proposal by congressional staffers. See Rehm, *supra* note 81. The Federal Reserve Board staff may allow the bank holding company to include the assets of the savings association to be acquired in determining if this test is met, thus permitting a bank holding company to consider acquiring a larger savings association than might otherwise be possible. See Doyle & DeSimone, *supra* note 39. "The practical result of this methodology is that the holding company's pre-transaction depository institution subsidiary need only be greater in size by \$1 than the savings institution to be acquired." J. Williams, Savings Institutions: Mergers, Acquisitions and Conversions § 12.01[4].

94. See 12 U.S.C. § 1815(d)(3)(E)(ii) (Supp. I 1989).

95. See *id.* § 1815(d)(3)(E)(iii). The purpose of this requirement may be to ensure that the resulting entity does not retain certain advantages of the savings association charter, such as savings association branching rights. See Doyle & DeSimone, *supra* note 39.

96. See 12 U.S.C. § 1815(d)(3)(E)(v) (Supp. I 1989).

97. See *id.* § 1815(d)(3)(E)(iv)(II). For transactions that occurred during the one-year period prior to August 9, 1990, the statute provides that the savings association must have tangible capital of less than four percent during the preceding quarter. See *id.* at § 1815(d)(3)(E)(iv)(I). The capital limitation provisions were added to Rep. Oakar's proposal by congressional staffers. See Rehm, *supra* note 81.

The Federal Reserve Board has interpreted the capital test as applying to the quarter immediately preceding the savings association's acquisition by a bank holding company, rather than to the quarter preceding the actual merger of the savings association into an existing bank subsidiary. See J. Williams, *supra* note 93, § 12.01[4]; Doyle & DeSimone, *supra* note 39. Thus, bank holding companies that purchased savings associations prior to FIRREA and then capitalized them at six percent of assets pursuant to Federal Reserve Board requirements were still eligible to merge the savings associations into an existing bank subsidiary prior to August 1, 1991. See Doyle & Simone, *supra* note 39. After FIRREA's passage, Representative Oakar attempted to clarify the meaning of "during the preceding quarter" by entering into the Congressional Record an interpreta-

Committee may have inserted this provision so that for at least the first two years following FIRREA's enactment bank holding companies would concentrate their acquisition and consolidation efforts on thrifts with weaker capital positions. The thrift acquisition enhancement provisions contain no capital limitations, however, so that a bank holding company could acquire any savings association and hold it as a separate nonbanking subsidiary until August 9, 1991, at which time the Oakar consolidation could take place upon the expiration of its capital restrictions.

C. Other FIRREA Provisions

1. The Sasser Amendment: The Conversion of a Savings Association Subsidiary to a Bank Charter

In a provision commonly referred to as the Sasser Amendment, FIRREA provides that the deposit insurance conversion moratorium should not be construed as prohibiting a savings association with SAIF deposit insurance from converting to a bank charter during the five-year moratorium period, so long as the resulting bank retains SAIF deposit insurance.⁹⁸ At the end of the five-year deposit insurance conversion moratorium, it would be possible for the resulting bank to convert from SAIF to BIF insurance upon payment of the appropriate exit and entrance fees.⁹⁹ This provision also evidences congressional concern with

tion similar to that of the Federal Reserve Board, suggesting that "[a]ny contrary result would unfairly penalize those institutions whose capital positions had been improved after acquisition, and indeed would encourage acquirers not to improve the thrift's tangible capital position." 135 Cong. Rec. E3, 219-20 (daily ed. Sept. 28, 1989). The OTS has interpreted "the preceding quarter" to refer to the quarter preceding the combination of the savings association with the bank subsidiary of the bank holding company. See J. Williams, *supra* note 93, § 12.01[4].

98. See 12 U.S.C. § 1815(d)(2)(G) (Supp. I 1989). The Sasser Amendment is not viewed as affirmative authority for the thrift-to-bank charter conversion. Independent authority and approval for that charter conversion must be obtained under appropriate state or federal law.

The powers of a savings association that converts to a bank charter would presumably be commensurate with those powers granted by the bank chartering authority. A recent FDIC regulation, however, provides that a SAIF-member state bank resulting from a savings association conversion remains subject to various regulatory restrictions on savings associations provided for in FIRREA. See 56 Fed. Reg. 20,520 (1991) (to be codified at 12 C.F.R. § 333.33). Savings associations converting to national banks, however, are not covered by the new FDIC rule because "national banks operate under a federally legislated scheme that subjects them (with only minor exceptions) to the same, if not more stringent, restrictions that would be imposed by the regulation." *Id.* at 20,525.

The location of a savings association converted to a bank is subject to the Douglas Amendment to the Bank Holding Company Act. See 12 U.S.C. § 1842(d) (1988). Bank branching restrictions are applicable rather than the sometimes more liberal thrift branching restrictions. Unless the savings association was originally acquired by the bank holding company in an emergency acquisition, once it converts to a bank charter it must divest any branches that would be inappropriate for that bank to operate under applicable state or federal law.

99. See 12 U.S.C. §§ 1815(d)(2)(A)(ii), (d)(2)(E) & (d)(2)(G) (Supp. I 1989).

the financial integrity of SAIF rather than with the continued livelihood of the thrift charter. The advantage of the Sasser Amendment is that a bank holding company need not operate a thrift institution and may benefit from the public's perception of the stronger bank charter. Because the operations of the former savings association are not consolidated with an existing bank subsidiary, as in an Oakar transaction, the cost savings realized as a result of the ownership of the former savings association may be substantially less than in an Oakar consolidation.

2. Insubstantial Deposit Transfer

A portion of the deposits of a savings association may be consolidated with a bank's deposits in an insubstantial deposit transfer. This type of transaction is established in FIRREA as an exception to the five-year deposit insurance conversion moratorium.¹⁰⁰ Notwithstanding the moratorium, the FDIC is directed to approve a deposit insurance conversion from SAIF to BIF if the conversion transaction affects only an "insubstantial portion . . . of the total deposits of each depository institution participating in the conversion transaction."¹⁰¹ The statute provides that a conversion transaction shall be deemed to affect an insubstantial portion of the total deposits of a depository institution if the aggregate amount of all deposits transferred in such transaction and in all conversion transactions occurring after FIRREA's enactment is less than 35 percent of the institution's deposits.¹⁰² Upon conversion of insurance funds, exit and entrance fees must be paid to SAIF and BIF.¹⁰³ It is possible that this provision was included in recognition of the fact that thrifts might need a way to sell a portion of their deposits (including an entire branch) in order to raise capital to meet the higher capital standards imposed by FIRREA.¹⁰⁴

100. See *id.* § 1815(d)(2)(C)(i). See generally Stein, *Branch Purchases and Sales: Response to Demand for Capital Restructuring for Savings and Loans*, 54 Banking Rep. (BNA) 1011 (1990); Mitchell, *Thrift Acquisitions After FIRREA (Part II)*, N.Y.L.J., Apr. 14, 1990, at 3.

101. 12 U.S.C. § 1815(d)(2)(C)(i) (Supp. I 1989). If the deposits are transferred to a bank subsidiary of a bank holding company, the bank subsidiary is regulated as any bank subsidiary would thereafter be regulated.

The Administration bill also permitted an insubstantial deposit transfer. The FDIC may consent to a conversion transaction if the transaction affects only an insubstantial portion of the insured liabilities of each financial institution participating in the conversion transaction. The FDIC would determine whether the transaction affects only an insubstantial portion of the deposit liabilities. See S. 413, 101st Cong., 1st Sess. § 206(5), 135 Cong. Rec. S1517 (daily ed. Feb. 22, 1989).

The Bank Merger Act, 12 U.S.C. § 1828(c), also applies so that the primary federal regulator of the resulting bank must approve the deposit purchase. See Grady, *Profits (and Pitfalls) Await in Buying or Selling Branches*, Am. Banker, Jan. 9, 1991, at 6. If a state-chartered institution is involved in the transaction, the state regulator must also grant approval. *Id.*

102. See 12 U.S.C. § 1815(d)(2)(D) (Supp. I 1989).

103. See *id.* § 1815(d)(2)(E).

104. See Mitchell, *supra* note 100, at 3. "A branch sale may be used by an undercapi-

D. *The Emergency Acquisition of an Insolvent Savings Association by a Bank Holding Company*

FIRREA moved the thrift emergency acquisition provisions added by the Garn-St. Germain Act of 1982 from the National Housing Act to the Federal Deposit Insurance Act.¹⁰⁵ It also made certain other technical and definitional changes to the previous law. The Garn-St Germain Act's statutory scheme that gave priority to bids from similar types of institutions located in the same state as the thrift target was eliminated in favor of priority for the lowest cost bid.¹⁰⁶ Neither the Conference Committee's Report nor the House Banking Committee's Report contains any explanation of the reasons the bidding priority scheme was eliminated.¹⁰⁷ This change, however, is also consistent with the view that Congress abandoned the goal of maintaining thrifts as a specialized form of depository institution in favor of resolving insolvent thrift institutions at the least cost to the government.¹⁰⁸

FIRREA authorizes a bank holding company to acquire control of a savings association in an emergency acquisition if the FDIC determines that the acquisition will not present a substantial risk to the safety or soundness of the savings association or the company acquiring it.¹⁰⁹ Deposit insurance for the savings association subsidiary is provided by SAIF. The savings association must not conduct any activities that are not permissible for a nonbanking subsidiary of a bank holding com-

talized thrift to increase its capital ratio to comply with the new capital requirements established by FIRREA through the sale of their branches to commercial banks." *Id.*

105. See FIRREA, *supra* note 1, § 217(8), 12 U.S.C. § 1823(k) (Supp. I 1989); see generally Zisman & Churchill, *supra* note 4.

106. See FIRREA, *supra* note 1, § 217(8), 12 U.S.C. § 1823(k) (Supp. I 1989); H.R. Rep. No. 54, *supra* note 48, at 336, reprinted in 1989 U.S. Code Cong. & Admin. News at 132 (eliminating the bidding preference and requiring the FDIC to give consideration to the need to minimize the cost of financial assistance).

107. See H.R. Conf. Rep. No. 222, *supra* note 49, at 398, reprinted in 1989 U.S. Code Cong. & Admin. News at 437. FIRREA "remove[s] the procedures under current law that give priority to in-State thrift acquirers of failing thrifts. The acquisition of failing thrifts by banks or bank holding companies is authorized." *Id.*; see also H.R. Rep. No. 54, *supra* note 48, at 336, reprinted in 1989 U.S. Code Cong. & Admin. News at 132 (The House Report stated that "[p]rovisions of former section 408(m) establishing preferences in approving applications to acquire a failing institution based on the location of the applicant and the type of applicant are deleted. The FDIC is required to give consideration to the need to minimize the cost of financial assistance.").

108. See *supra* text accompanying notes 75-77.

109. See FIRREA, *supra* note 1, § 217(8), 12 U.S.C. § 1823(k)(1)(A)(i)(III) (Supp. I 1989) (FDIC authorized to approve an emergency acquisition or merger of a savings association, even if the acquisition or merger would otherwise violate state law, if the FDIC determines in its discretion that the acquisition would lessen the risk to the FDIC).

The savings association subsidiary may retain its existing branches even if such branch locations would not be permissible for a similarly situated bank subsidiary. See 12 U.S.C. § 1823(k)(4)(A) (Supp. I 1989). Moreover, the savings association subsidiary is specifically authorized to establish and operate new branches to the same extent as any savings association that is not affiliated with a bank holding company and the home office of which is located in the same state as the bank holding company. See *id.*

pany.¹¹⁰ The Douglas Amendment does not operate to limit the location of the savings association subsidiary.

The FDIC may also authorize a savings association that is eligible for FDIC assistance to merge or consolidate with, or to transfer its assets or liabilities to an FDIC-insured bank.¹¹¹ The resulting bank subsidiary may escape the deposit insurance conversion moratorium if the conversion occurs in connection with the acquisition of a SAIF member in default or in danger of default and if the FDIC determines that the estimated benefits to the SAIF deposit insurance fund and to the RTC are equal to or exceed the FDIC's estimated loss of deposit insurance assessment income to SAIF over the remainder of the five-year moratorium period.¹¹² If the deposit insurance conversion is approved, exit and entrance fees must be paid to SAIF and BIF.¹¹³

III. BANK HOLDING COMPANY ACQUISITIONS OF SAVINGS ASSOCIATIONS SINCE FIRREA

The objective of the thrift acquisition enhancement provisions of FIRREA and the Oakar Amendment is to attract bank holding company capital to savings associations.¹¹⁴ Given the problems of the thrift industry, one might wonder whether bank holding companies would be willing to purchase thrift institutions even if statutorily authorized to do so.¹¹⁵

110. 12 U.S.C. § 1843(c)(8) (1988).

111. *See id.* § 1823(k)(1)(A)(i)(I) (Supp. I 1989). Upon merger into a bank subsidiary, the activities of the resulting entity are constrained by those activities permitted by the bank chartering authority.

The establishment and operation of additional branches of the resulting subsidiary are subject to bank branching restrictions; any more favorable savings association branching rules are lost upon the merger of the savings association into a bank subsidiary. *See* 12 U.S.C. § 1823(k)(4)(A) (Supp. I 1989). The Federal Courts of Appeal for the Eighth and Tenth Circuits, however, have recently upheld an RTC regulation providing that the resulting bank subsidiary is entitled to retain and operate existing branches of the former savings association in locations that might not otherwise be permissible for the bank subsidiary under bank branching laws. *See State v. Colo. ex rel. Colo. State Banking Bd. v. RTC*, 926 F.2d 931 (10th Cir. 1991); *Arkansas State Bank Comm'r v. RTC*, 911 F.2d 161 (8th Cir. 1990). The RTC regulation, 12 C.F.R. § 1611.1 (1991), provides that

Each existing office or other existing facility of each savings association that is merged or consolidated with, or the accounts and liabilities of which are transferred to, an insured bank pursuant to section [1823(k)] may be retained by the insured bank and operated by the bank as a branch or other facility.

Id. § 1611.1(b). The state banking department, the challengers in both of these cases, argued unsuccessfully that the RTC regulation exceeded the RTC's statutory authority granted in FIRREA. They argued that FIRREA allowed branch retention only when the savings association was acquired by a bank holding company in an emergency acquisition and continued to be operated by the bank holding company as a separate savings association subsidiary. *See Colorado State Banking Bd.*, 926 F.2d at 936; *Arkansas State Banking Comm'r*, 911 F.2d at 169; *see also infra* note 176.

112. *See* 12 U.S.C. § 1815(d)(2)(C)(ii) (Supp. I 1989). The RTC must concur in the FDIC's cost savings estimates. *See id.* § 1815(d)(2)(E) & (F).

113. *See id.* § 1815(d)(2)(E) & (F).

114. *See supra* text accompanying note 62.

115. *See Moore & Murphy, Commercial Bank Acquisitions of Thrifts: Fundamentals*

Since FIRREA's enactment, however, almost two-thirds of the over \$100 billion of thrift assets that have changed hands have been purchased by banks or bank holding companies.¹¹⁶ Numerous business reasons make bank holding company-savings association combinations attractive business opportunities for both parties to the combination.¹¹⁷ Moreover, FIRREA's Oakar consolidation mechanism further enhances the business advantages to a bank holding company of acquiring a savings association. The Oakar Amendment has also proved popular in structuring transactions that were probably not in the contemplation of Representative Oakar or the Conference Committee when the amendment was added to FIRREA.¹¹⁸

Only some forty acquisitions have been announced by bank holding companies intending to acquire solvent savings associations.¹¹⁹ Although this is a significant amount of activity,¹²⁰ the overwhelming majority of bank holding company acquisitions of thrifts, in number and in dollar amount of assets purchased, have been acquisitions of thrifts from the RTC in governmentally assisted transactions.¹²¹ This suggests that the legislative goal of attracting private capital to the purchase of solvent savings associations has not yet been fully realized.

A. *Motivations for Bank Holding Company Acquisitions of Savings Associations*

1. Business Advantages of a Bank Holding Company-Savings Association Combination

The acquisition of a thrift is a cost-effective way for a bank holding company to increase its market share.¹²² It is generally thought to be cheaper, quicker and easier to increase market share by purchasing an existing institution, which already has depositors and loan customers, than by attempting to attract new depositors and borrowers.¹²³ Furthermore, acquisition of a thrift is usually cheaper than acquisition of a

Should Guide Acquirers, Bank Acct. & Fin., Summer 1990, at 22 ("In many communities, bankers recoil at the thought of acquiring the savings and loan down the street. They cannot conceive of a reason to pay any price for a thrift—much less a premium over book value.").

116. See *supra* notes 10-11.

117. See *infra* text accompanying notes 122-45.

118. See *infra* text accompanying notes 146-58.

119. See SNL Securities, *supra* note 10.

120. See Sanchez, *Getting the Most from Thrift Acquisition: A New York Bank Shows How*, Am. Banker, Oct. 17, 1990, at 21 (Freed by FIRREA "to acquire healthy thrifts, banks have been doing so at a ravenous pace. Twenty bank-thrift deals have been announced this year.").

121. See *infra* text accompanying notes 179-81.

122. See Moore & Murphy, *supra* note 115, at 22-23; Quackenbush & Willkomm, *New Opportunities in Thrift Acquisitions*, Bankers Mag., Jan./Feb. 1990, at 24, 24.

123. See Svare, *Bank/Thrift Mergers: Are They on the Upswing?* Bank Admin., August 1989, at 12, 12; Breyer, *supra* note 38 (the "cost of acquiring thrift institutions . . . is generally less expensive than branching de novo into a market area").

bank.¹²⁴ Thrifts have fewer capital assets and lower overhead expenses than most banks and therefore sell for lower earnings multiples than banks.¹²⁵ For instance, during a recent period banks with assets exceeding \$500 million sold for a median price of 1.8 times book value, while the median price for similar healthy thrifts was only 1.2 times book value.¹²⁶

For some bank holding companies, however, a savings association is attractive, not as a vehicle to increase market share in an existing market, but rather as a means of entering a new market not served by any of the bank holding company's existing bank subsidiaries because of the application of the Douglas Amendment or bank branching restrictions.¹²⁷

Savings association acquisitions are also advantageous because a bank holding company acquirer may expect to reduce the costs of operation of the acquired savings associations by combining certain of its back office operations with existing bank and bank holding company operations.¹²⁸ Moreover, a bank holding company may find opportunities to increase revenues by marketing bank services such as credit cards, consumer loans and business loans to the customers of the affiliated savings association.¹²⁹ It is also possible that a bank holding company may be able to redirect some thrift deposits to lending opportunities available elsewhere in the holding company structure that are more profitable than those available to the savings association.¹³⁰ The benefits to be gained from

124. See Bush, *Why Are Banks Buying Savings Institutions?*, Sav. Inst., April 1990, at 31, 33 ("No one disputes that acquiring a stock savings institution is less expensive than acquiring a comparable commercial bank.").

125. See Moore & Murphy, *supra* note 115, at 23; Quackenbush & Willkomm, *supra* note 122, at 28 ("The average publicly traded healthy thrift trades at only 6 times earnings and 60% of stated book value," while "a fairly typical bank stock might trade at 125 percent of book value and 8 times earnings."); Svare, *supra* note 123, at 12.

126. See Matthews, *Banks Buying S&Ls Faster Than Industry Perceives*, Am. Banker, Jan. 16, 1990, at 1.

127. See Bush, *supra* note 124, at 32 (thrifts are attractive to bank holding companies if a bank acquisition in the target market is not permitted); Breyer, *supra* note 38 (bank holding companies located in states that restrict branching or multibank holding companies may be especially attracted to a thrift acquisition for this reason).

The acquisition of a thrift institution is not generally viewed as an effective vehicle for expansion by a bank holding company into a new market. See Moore & Murphy, *supra* note 115, at 25 (interstate thrift acquisitions are far less likely to result in economies of scale than in-market thrift acquisitions). In addition, thrift institutions are, for the most part, smaller institutions than their bank competitors and hold a correspondingly smaller share of the market. When seeking to expand into a new market, many bank holding companies wish to acquire an institution with a significant market presence. See Roosevelt, *Bankers Not Lining Up to Buy Healthy S&Ls, Analysts Say*, Am. Banker, July 17, 1989, at 1. If an acquisition of a bank with substantial market share is not currently available because of the Douglas Amendment, it is possible that a bank holding company may wish to postpone its new market expansion plans pending legislative proposals to repeal the Douglas Amendment.

128. See Moore & Murphy, *supra* note 115, at 23; Svare, *supra* note 123, at 12; Sanchez, *supra* note 120.

129. See Belew, *supra* note 67, at 41; Moore & Murphy, *supra* note 115, at 23.

130. See Quackenbush & Willkomm, *supra* note 122, at 27 (giving an example of how

such a savings association acquisition are even more pronounced when the acquired savings association is consolidated with an existing bank subsidiary pursuant to the Oakar Amendment.¹³¹

Savings associations that are still mutual institutions owned by their depositors rather than by stockholders are an especially cheap source of additional market share that many bank holding companies may have neglected until now.¹³² Although a number of thrifts converted from mutual to stockholder-owned status in the 1980s, over one-half of all savings associations are still mutual in form.¹³³ Mutual thrifts generally sell at forty-five to fifty-five percent of their pro forma book value, while stockholder-owned institutions typically sell at prices ranging only somewhat below book value to premiums of up to thirty percent above book value.¹³⁴ This price disparity between mutual and stock institutions is explained by the absence of a control premium for a mutual institution.

A merger-conversion of a mutual savings association may be effectuated by the conversion of the mutual institution into a stockholder-owned savings association and its simultaneous merger into a bank subsidiary of a bank holding company pursuant to the Oakar Amendment. The stock that is issued to the mutual's depositors who elect to subscribe to the stock issuance is bank holding company stock.¹³⁵ Although merger-conversions of mutual thrifts are extremely attractive from a bank holding company's standpoint, there are several potential problems in consummating such transactions. The management of the mutual in-

reinvestment of 10% of a thrift's mortgage assets into consumer or commercial loans might increase the institution's after-tax return on assets).

131. Moore & Murphy, *supra* note 115, at 25.

132. See Bush, *supra* note 124, at 32; Vartanian, Ansell & Rockford, *supra* note 70, at 16 n.2 ("[T]he acquisition can be completed with a limited out-of-pocket cost; i.e., there are no shareholders to pay [A] merger conversion may be viewed both as a means of expanding market presence and of increasing capital."); Marks, *Merger-Conversion a Profitable Way to Acquire a Healthy Mutual Thrift*, Am. Banker, Aug. 8, 1990, at 26 ("Merger-conversions are very attractive economically to acquirors, so much so that the only question is why more banks and thrifts aren't using this vehicle." From the standpoint of the bank holding company acquiror, "the stock offering is usually at the prevailing market price and the gross proceeds are usually about the same as the thrift's equity, the deal is almost always antidilutive to existing shareholder equity.").

133. See Moore & Murphy, *supra*, note 115, at 30.

134. See *id.*

135. A mutual institution converts to stock form and the bank holding company acquires all of the capital stock of the converted savings association. The depositors are given subscription rights to purchase bank holding company stock (instead of savings association stock) in an amount equal to the appraised value of the savings association. Stock that is not sold to deposit account holders is sold to the public either in a direct community offering or in an underwritten public offering. See 12 C.F.R. § 563b.10 (1991) (dealing with the conversion of a savings association in connection with an acquisition by an existing holding company and the conversion of a savings association through a merger with an existing stock savings association); OTS Chief Counsel Opinion, No. 90/CC-12 (Nov. 26, 199) [Current] Fed'l Banking L. Rep. (CCH) ¶ 82,459 (describing an Oakar consolidation involving a mutual savings association); Doyle & DeSimone, *supra* note 39. The percentage of depositors subscribing to the stock issuance is usually small.

stitution controls the decision of whether to undertake the merger-conversion, and controls the selection of the acquiring bank holding company.¹³⁶ There are no shareholders to consider whether a sale of stock in response to a bank holding company purchase offer is an economically favorable transaction. While shareholders of an existing stockholder-owned thrift may be willing to entertain a stock purchase offer from a bank holding company that will result in their economic gain, it is the management of a mutual thrift that must be convinced that the proposed merger-conversion will benefit the institution and its depositors.¹³⁷ Furthermore, recognizing the disparities in book value at which a mutual thrift is sold compared to a stock thrift, the mutual's management may deem it advisable for the mutual to effect a conversion to stockholder-owned status at less than book value and then to sell to a bank holding company at book value or at a premium over book value, so that the mutual's depositors who subscribe to the stock issuance gain the benefit of the control premium rather than the bank holding company acquirer.¹³⁸

Another source of deposits at economical prices are savings associations for sale by the RTC. In many cases the RTC sells thrift institutions at very small premiums over core deposits.¹³⁹ Further, the RTC reduces the potential risk of insolvent thrift acquisitions by offering generous put-back options that permit the acquirer to sell back to the RTC assets that do not meet the acquirer's expectations.¹⁴⁰

A bank holding company-savings association combination benefits the savings association as well as the bank holding company. A savings association may be willing to entertain a bank holding company's acquisition proposal for a number of reasons, including the desire of the shareholders of a stock savings association to profit by selling their thrift stock to a bank holding company at a price that will result in their economic gain. Regulatory changes made in FIRREA also make a bank holding company acquisition attractive from the point of view of a savings association. Many thrifts may need the infusion of capital to be provided by the bank holding company acquirer to meet FIRREA's more stringent capi-

136. See Moore & Murphy, *supra* note 115, at 31.

137. See *id.* at 31-32 (given the bargaining power of the management of a mutual thrift, they may usually negotiate "[m]ore attractive employment contracts and benefits and higher-than-normal representation on the acquiror's board of directors or in management"); Marks, *supra* note 132, at 26 (the mutual's management may "negotiate some degree of independence, favorable compensation, or job guarantees").

138. See Moore & Murphy, *supra* note 115, at 31. OTS regulations restrict the transfer of control during the first three years after a mutual converts to a stock institution.

139. See Marks, *Industry Consolidation Progresses as More Banks Buy S&L Deposits* Am. Banker, Nov. 18, 1990, at 17 ("Ratios of premiums to core deposits in RTC transactions have averaged 2.54% since resolutions were initiated in September 1989"); *supra* text accompanying notes 4-7.

140. See Marks, *supra* note 139, at 17 ("The ratio of premium to core deposits on an RTC deal, however, can be as low as zero, with complete put-back options on assets transferred with the deposits."); *supra* text accompanying note 7.

tal requirements.¹⁴¹ In today's economic climate, alternative methods of increasing capital, such as selling additional stock or increasing retained earnings, may not be feasible for thrift institutions.¹⁴² Thus, selling to a bank holding company or downsizing by selling branches to a bank holding company may be the only practical ways for a savings association to satisfy the increased capital requirements.¹⁴³

FIRREA also subjects savings associations to new regulatory burdens, including an expanded qualified thrift lender test.¹⁴⁴ If the required concentration in mortgage-related assets is not possible or profitable, a savings association may consent to an acquisition by a bank holding company and merge into a subsidiary bank where its depositors' funds may be put to less restricted and more productive uses.¹⁴⁵

2. Oakar Consolidations

Most bank holding companies have acquired savings associations located in the markets served by their existing bank subsidiaries.¹⁴⁶ The consolidation of the savings association subsidiary into an existing bank subsidiary is, as Representative Oakar predicted, an attractive vehicle for maximizing operational efficiencies and cost reductions.¹⁴⁷ In addition, the resulting bank entity has the benefit of the public's more favorable

141. See FIRREA, *supra* note 1, § 301, 12 U.S.C. § 1464(t) (Supp. I 1989); Bush, *supra* note 124, at 31; Moore & Murphy, *supra* note 115, at 22 ("Higher capital requirements will cause many thrifts to seek merger partners"); Marks, *supra* note 139, at 17; see also Clark, Murtagh & Corcoran, *supra* note 51, at 1034-65 (for an extensive discussion of FIRREA's capital requirements for savings associations).

142. See generally MacRae, *supra* note 8, at 31-34 (discussing alternative methods of increasing thrift capital).

143. See, e.g., Stein, *supra* note 100, at 1011; Nagle, *Branch Sales Will Escalate As Consolidation Proceeds*, Am. Banker, Feb. 27, 1991, at 13 ("Inadequately capitalized institutions have the most obvious rationale for selling branches: to decrease the balance sheet by the amount of deposits sold and to enhance the equity by the premium received on the deposit sale."); Marks, *supra* note 139 ("branch sales offer the easiest way for thrifts to downsize and build their capital ratios").

144. FIRREA raised the percentage of assets that a thrift must devote to home mortgage lending from 60% to 70%, effective July 1, 1991, and narrowed the types of assets that might be counted. See FIRREA, *supra* note 1, § 303(a), 12 U.S.C. § 1467a(m) (Supp. I 1989); 56 Fed. Reg. 19,318 (1991) (to be codified at 12 C.F.R. § 563); see also Clark, Murtagh & Corcoran, *supra* note 51, at 1065-74 (discussing FIRREA's QTL requirements).

145. See Moore & Murphy, *supra* note 115, at 27.

146. See, e.g., Huggins, *Don't Just Kick the Tires*, ABA Banking J., December 1989, at 34 ("the most successful acquisitions are intra-market . . . because of the cost savings and 'synergies' it makes possible"); Matthews, *supra* note 126, at 21 ("Nearly all the thrift deals struck in 1989 were used by banks as a means of filling in gaps in their franchises, rather than as extensions of their markets."); see also Moore & Murphy, *supra* note 115, at 24 ("Most analysts agree that intramarket acquisitions have a better chance of success" than out-of-market acquisitions.).

147. See, e.g., Bush, *supra* note 124, at 32 ("Banks get to eat their cake and have it, too — acquiring savings institutions, converting them to banks and avoiding the exit/entry fee — by use of the Oakar amendment."); Moore & Murphy, *supra* note 115, at 25 (integration of an acquired thrift into a bank subsidiary "offers the greatest opportunities for synergies").

perception of a bank charter than of a thrift charter.¹⁴⁸ It is not surprising, therefore, that over one-half of the Federal Reserve Board approvals of savings association acquisitions by bank holding companies have been of transactions structured pursuant to the Oakar Amendment, wherein the acquired savings association is consolidated with a bank subsidiary of the bank holding company.¹⁴⁹

The Oakar structure has been creatively utilized to structure thrift branch purchases and purchases from the RTC, although FIRREA provides alternative methods to structure these transactions. For instance, a variation on the Oakar transaction, called an "Oakarized branch purchase," has been developed, in which an insubstantial portion of the deposits of a savings association are purchased by a bank holding company, initially placed in a new thrift subsidiary, and are then merged into a bank subsidiary.¹⁵⁰ It is likely, however, that the Conference Committee expected branch purchases to be accomplished through the vehicle of the insubstantial deposit transfer.¹⁵¹ When FIRREA was enacted, the obvious advantage of that statutory structure was an exception from the deposit insurance conversion moratorium so that the insubstantial depos-

148. Banks "enjoy a better public image" than thrift institutions. *See Moore & Murphy, supra* note 115, at 26.

149. *See, e.g.,* Mid Am, Inc., 76 Fed. Res. Bull. 962, 962 (1990) (bank holding company to purchase state-chartered savings association and merge it into its national bank subsidiary); Norwest Corp., 76 Fed. Res. Bull. 873, 873-74 (1990) (mutual federal savings bank converted to stock, converted to a national bank and merged into an existing national bank subsidiary of a bank holding company; Board found that use of the interim national bank to accommodate the appropriate merger statutes did not cause the transaction to fall outside of the Oakar amendment); Ida Grove Bancshares, Inc., 76 Fed. Res. Bull. 693, 693 (1990) (state bank subsidiary to purchase assets and assume liabilities of state savings association that was established by bank holding company to purchase assets and assume liabilities of federal savings association).

Most of the remaining approvals have been of bank holding company acquisitions of a savings association to be operated as a nonbanking subsidiary of the bank holding company. *See* South Carolina Nat'l Corp., 76 Fed. Res. Bull. 1060 (1990); Bancorp Hawaii, Inc., 76 Fed. Res. Bull. 759 (1990); *see also* First Banks, Inc., 76 Fed. Res. Bull. 669 (1990) (target will convert from mutual to stock form); National City Corp., 76 Fed. Res. Bull. 77 (1990) (target will convert from mutual to stock form). At the time of these acquisitions an Oakar transaction may not have been possible if the tangible capital of the target savings association was above the statutory capital amounts set forth in 12 U.S.C. § 1815(d)(3)(E)(iv) (Supp. I 1989).

The Sasser amendment, which permits a bank holding company to convert an acquired thrift to a bank charter, has been used rarely. *See* Barnett Banks, Inc., 76 Fed. Res. Bull. 68 (1990) (application to acquire a bank that is successor to Barnett's existing thrift subsidiary which intends to convert from a federal savings bank charter to a state savings association charter and then to a state commercial bank charter).

150. *See* OTS Chief Counsel Opinion No. 90/CC-3 (Dec. 20, 1990), [Current] Fed'l Banking L. Rep. (CCH) ¶ 82,467 (cross-industry branch purchase and sale transaction and deposit transfer fees); Grady, *supra* note 101 (the 35% limitation on insubstantial deposit transfers and the Oakar Amendment requirements must be met in an insubstantial deposit transfer); NCNB Corp., 77 Fed. Res. Bull. 119 (1991); Merchants Capital Corp., 76 Fed. Res. Bull. 695 (1990).

151. *See* FIRREA, *supra* note 1, § 206(a)(7), 12 U.S.C. § 1815(d)(2)(C)(i); (d)(2)(D) (Supp. I 1989); *supra* text accompanying notes 100-04.

its purchased from the savings association could be immediately converted from SAIF to BIF insurance upon the payment of the appropriate exit and entrance fees.¹⁵² At that time, the insurance charge on BIF-insured deposits was only 8.5 cents per \$100 of deposits, while the charge for SAIF-insured deposits was 20.8 cents per \$100 of deposits.¹⁵³

Since the differential between the deposit insurance premiums assessed by the SAIF and BIF funds has been eliminated, the automatic conversion from SAIF to BIF premiums has become a monetary liability, rather than a monetary advantage, because an immediate payment of exit and entrance fees is required to effect the deposit insurance fund conversion.¹⁵⁴ In an Oakarized branch transfer, however, SAIF deposit insurance is maintained on the portion of the bank's deposits attributed to the former savings association, and because there is no insurance fund conversion, exit and entrance fees are not assessed.¹⁵⁵

The Oakar structure has also been the preferred method of purchasing insolvent thrifts or thrift branches from the RTC.¹⁵⁶ Again, the Conference Committee probably anticipated that bank holding companies would utilize the consolidation provision for emergency acquisitions¹⁵⁷ and take advantage of the exception provided to the deposit insurance conversion moratorium to convert the savings association deposits from SAIF to BIF insurance.¹⁵⁸ The Oakar Amendment is popular in structuring RTC acquisitions for the same reasons that the Oakarized branch transfer is preferred over the insubstantial deposit transfer provision. Exit and entrance fees may be avoided in an Oakar transaction because there is no deposit insurance fund conversion.

The addition of the Oakar Amendment to FIRREA leaves few reasons or incentives for a bank holding company to continue to operate its newly acquired thrift subsidiary as a separate entity.¹⁵⁹ The most substantial current drawback to consolidating a thrift subsidiary into a bank subsidiary, however, is the cost of the recapture of the savings association's bad debt reserve when it converts into a bank.¹⁶⁰ Thrift institu-

152. See 12 U.S.C. § 1815(d)(2)(D) (Supp. I 1989).

153. See FIRREA, *supra* note 1, § 208(4) (codified as amended at 12 U.S.C.A. § 1817(b) (West Supp. 1991)); Vartanian, Ansell & Rockford, *supra* note 70, at 14.

154. As of July 1, 1991, BIF and SAIF assess deposit insurance at the same rate of 23 cents per \$100 of deposits. See 56 Fed. Reg. 21,064 (1991) (to be codified at 12 C.F.R. § 327.13(c)(2)).

155. See FIRREA, *supra* note 1, § 217(a)(7), 12 U.S.C. § 1815(d)(3)(B) (Supp. I 1989).

156. See Banc One Corp., 76 Fed. Res. Bull. 259 (1990); Southeast Banking Corp., 76 Fed. Res. Bull. 99 (1990).

157. See FIRREA, *supra* note 1, § 217(8), 12 U.S.C. § 1823(k)(1) (Supp. I 1989).

158. See *id.* at § 206(a)(7), 12 U.S.C. § 1815(d)(2)(C)(ii).

159. See Bush, *supra* note 124, at 32-33 (evaluating whether a bank holding company should retain an acquired thrift as a separate thrift subsidiary or consolidate it with a bank subsidiary).

160. See Savings Ass'n Ins. Fund Indus. Advisory Comm., Semiannual Report 17 (May 3, 1991); Bush, *supra* note 124, at 32; Moore & Murphy, *supra* note 115, at 26; Svara, *supra* note 123, at 12; 55 Banking Rep. (BNA) 816, 816 (1990).

tions may deduct a portion of their earnings from their taxable income and place those funds in a bad debt reserve on which they pay no income taxes.¹⁶¹ At the time a thrift institution ends its thrift status and is consolidated into a bank, however, this bad debt reserve must be taken into income.¹⁶² The resulting bank incurs an immediate tax liability, which may amount to a substantial portion of the former thrift's net worth.¹⁶³ The cost of consolidating a thrift into a bank in an Oakar transaction must, therefore, include the potential tax liability from the recaptured bad debt reserve.

A separate savings association subsidiary of a bank holding company is also subject to the Bank Holding Company Act's limitations on non-banking activities.¹⁶⁴ Thus, the bank holding company loses many of the advantages of maintaining a separate thrift charter if additional activities, such as insurance and real estate, that could be conducted by a thrift are nevertheless prohibited for a thrift owned by a bank holding company.¹⁶⁵

A traditional advantage of maintaining a separate subsidiary—liability limitation—may not be available for commonly controlled depository institutions. FIRREA amended the Federal Deposit Insurance Act to provide that each depository institution subsidiary of a holding company guarantees the FDIC for any losses suffered by any commonly controlled depository institutions.¹⁶⁶ Thus, the cross-guarantee provision eliminates the advantage of maintaining a separate thrift subsidiary for the purpose of insulating that subsidiary's losses from the assets of other commonly controlled depository institution subsidiaries.¹⁶⁷ If the assets of all de-

161. See 26 U.S.C.A. § 593 (West Supp. 1991). The deduction is permitted only if the thrift maintains 60% of its assets in qualified housing-related investments. *Id.* at § 593(a)(2).

162. See Rev. Rul., 85-171, 1985-2 C.B. 148; *Accounting for Acquisitions of Thrifts by National Banks*, 1991 O.C.C.Q.J. Lexis 4 (Jan. 29, 1991) ("Upon acquisition by a bank, the excess tax bad debt reserves taken by a thrift may be immediately recaptured, resulting in a tax liability. Furthermore, if the acquired thrift's average assets exceed \$500 million, the entire bad debt reserve may have to be recaptured over future years as taxable income."); Doyle & DeSimone, *supra* note 39; Moore & Murphy, *supra* note 115, at 25-26.

163. For a mutual thrift institution with \$10 million in net worth, \$6 million of the net worth may possibly be in the bad debt reserve. If that \$6 million is taken into income at a 35% tax rate, the resulting tax liability is \$2.1 million. See Moore & Murphy, *supra* note 115, at 26.

164. See 12 U.S.C. § 1843(c)(8) (1988) (limiting nonbanking subsidiaries of a bank holding company to those activities so closely related to banking as to be a proper incident thereto).

165. See *supra* text accompanying notes 71-72.

166. See FIRREA, *supra* note 1, § 206(a)(7), 12 U.S.C. § 1815(e) (Supp. I 1989); *infra* text accompanying notes 205-08.

167. See Doyle & DeSimone, *supra* note 39 ("A potential acquiror should carefully consider the impact of the cross-guarantee provisions on any acquisition, particularly of a financially weak or undercapitalized savings association, since the acquisition may affect the debt ratings of affiliated banks and the ability of the parent of any affiliated banks to raise equity capital."); Huggins, *supra* note 146; Klinkerman, *Provision Dims Appeal of S&Ls for Banks Firms*, Am. Banker, Aug. 11, 1989, at 1 ("the most damaging aspect of

pository institutions can be used to cover the losses suffered by the FDIC with respect to any single depository institution subsidiary, the depository institution subsidiaries may as well be operated as branches of a single bank subsidiary.¹⁶⁸

Some bank holding companies that have maintained the acquired savings association as a separate subsidiary may only be doing so temporarily, planning to merge the thrift into a bank subsidiary upon the August 1991 expiration of the Oakar capital limitations, which previously restricted Oakar transactions to savings associations with tangible capital less than five percent.¹⁶⁹

In some instances a bank holding company may maintain a separate savings association subsidiary to avoid the application of the Douglas Amendment or bank branching limitations. Citicorp, for example, owns thrift subsidiaries in states that would not allow a New York bank holding company to own a bank in those states.¹⁷⁰ As interstate banking restrictions are liberalized or lifted, however, this reason for maintaining a separate thrift subsidiary becomes less important.

In many states, thrifts are afforded more liberal intrastate branching rights than banks,¹⁷¹ and a thrift subsidiary maintained in that form could take advantage of those greater branching possibilities.¹⁷² The *Deposit Guaranty* decision has removed much of the force of that advantage.¹⁷³ The United States Court of Appeals for the Fifth Circuit ruled in that case that national banks could branch to the same extent as state-chartered banks, including state-chartered thrifts, so long as the state thrift could be said to be "carrying on the business of banking."¹⁷⁴ Many states have amended their state bank branching laws to permit branching by state banks to the same extent that the state permits a state-chartered thrift to branch so that state banks will not be disadvantaged vis-a-vis their national bank competitors.¹⁷⁵

The Eighth and Tenth Circuits recently upheld an RTC regulation that provides that the branching advantages that a thrift may have over a commercial bank competitor may be retained by a bank subsidiary into

the cross-guarantee provision is the chilling effect it will have on interstate acquisitions" in which a multi-bank holding company structure must be used).

168. Golembe, *Government and Banking: The Changing Relationship*, Issues in Bank Reg., Summer 1989, at 11.

169. See 12 U.S.C. § 1815(d)(3)(E)(iv)(II) (Supp. I 1989).

170. See Weinstein, *supra* note 67.

171. See Broome, *supra* note 28, at 812. "One possible explanation for the disparity in branching privileges many states have granted to the different types of depository institutions may be that federal regulations provide that federally chartered thrifts may branch freely throughout a state and, in some circumstances, across state lines." *Id.* at 812 n.108.

172. See generally *id.* at 808-19.

173. See Department of Banking and Consumer Fin. v. Clarke, 809 F.2d 266 (5th Cir.), *cert. denied*, 107 S. Ct. 3240 (1987).

174. *Id.* at 270 (quoting 12 U.S.C. § 36(h)).

175. See Broome, *supra* note 28, at 851 & n.372.

which an acquired thrift is merged if the bank holding company acquired the insolvent thrift institution in an emergency acquisition.¹⁷⁶ Although subsequent thrift branching rights may be exercised only by a thrift institution and not by a bank into which a thrift has been merged, the bank may retain thrift branches existing at the time of the merger even though those branches would not otherwise be permitted for the bank.¹⁷⁷

In some instances, a bank holding company's business philosophy may have guided its decision to retain the thrift subsidiary as a separate institution and not consolidate it with an existing bank subsidiary.¹⁷⁸ For instance, a philosophy of local control and community service typifies many multi-bank holding companies. It is likely that such a holding company would elect to maintain its separate thrift subsidiaries even if an Oakar transaction were possible.

B. *Factors Limiting Bank Holding Company Acquisitions of Solvent Savings Associations*

Many bank holding companies have acquired savings associations since the enactment of FIRREA and have taken advantage of the Oakar consolidation mechanism to maximize the economic efficiencies of the acquisition. The great majority of the bank holding company-thrift acquisitions since FIRREA, however, have been acquisitions of insolvent thrifts from the RTC in emergency transactions, notwithstanding the opportunity to purchase solvent savings associations.¹⁷⁹ The RTC has entered into 378 separate transactions in which \$80.2 billion in thrift deposits have been sold by the RTC to banks or bank holding companies.¹⁸⁰ In the comparable time period, only thirty-nine private acquisitions by bank holding companies of thrifts were announced and these involved only \$9.9 billion in thrift assets.¹⁸¹ Prior to FIRREA, however,

176. See *Colorado ex rel. Colorado State Banking Bd v. RTC*, 926 F.2d 931, 948 (10th Cir. 1991) (upholding 12 C.F.R. § 1611.1 issued pursuant to 12 U.S.C. § 1823(k)(1) & (k)(4)); *Arkansas State Bank Comm'r v. RTC*, 911 F.2d 161, 173 (8th Cir. 1990) (same); see also Breslin, *RTC Efforts to Pre-empt State Banking Rules Draw Lawsuits, Rebukes from State Officials*, 54 Banking Rep. (BNA) 622 (1990); McCray, *Federal Preemption of State Branch Banking Laws Under FIRREA*, Intergovernmental Persp., Summer 1990, at 7; *supra* note 111.

177. See 12 U.S.C. § 1823(k)(4) (Supp. I 1989).

178. See Bush, *supra* note 124, at 32-34.

179. See Marks, *Weak Stocks, Troubled Assets Change the Shape of Deals*, Am. Banker, Feb. 20, 1991, at 13 ("In the private sector, the number and aggregate size of deals [for thrifts and banks] has gone down dramatically over the past two years.").

180. See SNL Securities, *supra* note 10; Nagle, *Most Active Acquirers Have Taken Advantage of Federal Assistance*, Am. Banker, July 8, 1990, at 21 ("The lure of government-assisted transactions has reduced the flow of private-sector acquisitions to a trickle.").

181. SNL Securities, *supra* note 10. The data provided by SNL Securities indicates that 39 private acquisitions involving \$9.9 billion in thrift assets have been announced by banks or bank holding companies since FIRREA. *Id.* In addition, 68 thrift branch sales to the bank industry involving \$13.4 billion in deposits have been announced. *Id.* An additional \$12.5 billion in thrift deposits are affected by 26 announced thrift conversion transactions with banking institutions, some of which, however, are supervisory conver-

when bank holding companies were authorized to acquire only failed thrifts, very few failed thrift acquisitions took place over a seven-year period.¹⁸²

Although bank holding companies were authorized to purchase insolvent thrifts prior to FIRREA, several statutory changes in FIRREA have made failed thrift acquisitions more attractive from the perspective of a bank holding company. Prior to FIRREA, the CEBA moratorium on exit from FSLIC prevented efforts by bank holding companies to consolidate thrift subsidiaries into bank subsidiaries and realize the resulting operating efficiencies.¹⁸³ Further, the tandem operations restrictions imposed by the Federal Reserve Board on thrift purchases prior to FIRREA prohibited bank holding companies from engaging in cross-marketing activities between bank and thrift subsidiaries.¹⁸⁴ FIRREA prohibits the imposition of such restrictions,¹⁸⁵ and removed restrictions in place prior to its passage.¹⁸⁶ For bank holding companies that wish to combine the operations of the acquired thrift with those of an existing bank subsidiary, the Oakar transaction has proved popular in effectuating that consolidation.¹⁸⁷

Moreover, the supply of insolvent thrifts has dramatically increased from the number of insolvent thrifts eligible for bank holding company purchase from 1982 to 1989.¹⁸⁸ Since August 1989, the RTC has taken control of 615 thrifts and considers another 334 thrifts likely to be added to its inventory.¹⁸⁹ With this large supply of institutions, it is not surprising that many potential acquirers, including bank holding companies,

sions. *Id.*; see also Marks, *supra* note 139 (In the last nine months of 1989, banks acquired thrift deposits in slightly less than 50% of the branch sales by thrifts); Sanchez, *supra* note 120 (during the first three quarters of 1990, an additional 20 nonemergency bank-thrift combinations were announced); Matthews, *supra* note 126 (from August 1989 until the end of December 1989, 25 bank holding company acquisitions of healthy thrifts were announced).

182. See Matthews, *supra* note 126 ("The first bank acquisition of a thrift only dates to 1982 and, given both regulatory difficulties and bankers' attitudes, few occurred"); Weiss & Stock, *supra* note 9 (few bank holding companies have acquired failed thrifts since 1982).

183. See *supra* text accompanying notes 38-41.

184. See *supra* text accompanying notes 31-34 and notes 66-68.

185. See FIRREA, *supra* note 1, § 601(a), 12 U.S.C. § 1843(i)(2) (Supp. I 1989).

186. FIRREA § 601(b) provides:

If the Board of Governors of the Federal Reserve System, in approving an application by a bank holding company to acquire a savings association, imposed any restriction that would have been prohibited under section 4(i)(2) of the Bank Holding Company Act of 1956 . . . if that section had been in effect when the application was approved, the Board shall modify that approval in a manner consistent with that section.

FIRREA, *supra* note 1, § 601(b), 12 U.S.C. § 1843 note (Supp. I 1989).

187. This was not an expected use of the Oakar Amendment. See *supra* text accompanying notes 156-58.

188. See Scott, *supra* note 9, at 1883 (thrift institution failures increased from only 11 in 1980 to 223 in 1988).

189. See Wall St. J., June 24, 1991, at 3. Of the 615 savings associations closed by the RTC, approximately two-thirds have been sold or liquidated. *Id.*

have found that insolvent thrifts are selling at attractive prices.¹⁹⁰

Notwithstanding the substantial business advantages of private market acquisitions of savings associations by bank holding companies, only some forty nonemergency acquisitions of savings associations by banks or bank holding companies have been announced since FIRREA's enactment.¹⁹¹ It is likely that nonassisted acquisitions of healthy thrift institutions have been limited for several reasons.

First, as just discussed, the large supply of insolvent thrifts and attractive prices offered by the RTC have diverted a great deal of the bank holding company demand for thrift deposits from the private sector to RTC-arranged acquisitions.¹⁹² Second, economic conditions since FIRREA's enactment in August 1989 and the substantial transaction costs associated with a thrift acquisition have played a role in explaining why there has not been greater healthy thrift acquisition activity. During the recent economic slowdown, bank holding companies have had less demand for deposit growth because of declining lending opportunities. Moreover, many bank holding companies have experienced declines in earnings and are thus not in a position to pay cash for thrift institutions. As a consequence of relatively low bank stock prices during this period, many bank holding companies have been reluctant to acquire thrift institutions through an exchange of bank holding company stock.¹⁹³ Mergers and acquisitions of banks have been adversely affected by these economic factors as well.¹⁹⁴

Third, notwithstanding the many advantages of an Oakar transaction and its popularity to date, there are several structural and legal problems with the provision. Some of the uncertainty accompanying Oakar transactions results from the placement of the Oakar Amendment in the Federal Deposit Insurance Act rather than in the Bank Holding Company

190. See Nagle, *RTC and FDIC Find a Buyer's Market for Failed Institutions*, Am. Banker, Mar. 27, 1991, at 11 (each quarter since the second period of 1990 has produced fewer buyers for insolvent thrifts and lower prices); Nagle, *supra* note 11 ("The RTC is a motivated seller with a virtually limitless supply of product so, except in unusual circumstances, there is not reason to bid aggressively.").

191. Data provided by SNL Securities, *supra* note 10, indicates that these transactions involve \$9.9 billion in thrift assets. Thirty-nine private acquisitions involving \$9.9 billion in thrift assets have been announced by banks or bank holding companies since FIRREA. In addition, 68 thrift branch sales to the bank industry involving \$13.4 billion in deposits have been announced. An additional \$12.5 billion in thrift deposits are affected by 26 announced thrift conversion transactions with banking institutions, some of which, however, are supervisory conversions. See *id.*

192. See Marks, *supra* note 179 (The "glut of public sales has understandably taken acquirers' attention away from private transactions.").

193. See *id.* (one factor accounting for dramatic drop in private deal activity is the "sharp decline in market value, which has drastically devalued the favored currency of bank transactions: stock"). But see Nagle, *Despite Depressed Share Prices, Stock Acquisitions Show Signs of Life*, Am. Banker, Dec. 27, 1990, at 13 (suggesting that stock acquisitions of banks and thrifts are "making a comeback of sorts").

194. See Piro & Nagle, *supra* note 11 (indicating that non-assisted bank acquisitions are picking up).

Act, where one would naturally expect to find a provision permitting a bank holding company to consolidate the operations of a savings associations subsidiary with a bank subsidiary. The Oakar Amendment also does not directly authorize the merger of a savings association into a bank or the conversion of a savings association charter to a bank charter.¹⁹⁵ Moreover, an Oakar transaction is subject to numerous regulatory approvals. The Oakar Amendment specifically requires that both the Federal Reserve Board¹⁹⁶ and the federal banking agency that has regulatory responsibility for the resulting bank subsidiary approve the transaction.¹⁹⁷ Additional regulatory applications and approvals are required to actually consummate an Oakar consolidation, however.¹⁹⁸ The time

195. The Sasser Amendment, however, authorizes a savings association to convert to a bank so long as the resulting bank retains SAIF deposit insurance. *See supra* text accompanying notes 98-99. Although the Sasser Amendment contains no specific language enabling the thrift-to-bank charter conversion, these conversions have been authorized by the OTS. *See* OTS Chief Counsel Opinion No. 90/CC-18 (Nov. 17, 1990), [Current] Fed'l Banking L. Rep. (CCH) ¶ 82,453. The OTS has reasoned that it would permit a federally chartered savings association to convert to a national bank directly because the same result could be accomplished indirectly through one of two possible structures. *See id.* The federal savings association could convert to a state chartered savings association, which might then convert to a state bank if so permitted under state law. *See id.* Alternatively, the federal savings association could voluntarily dissolve pursuant to 12 C.F.R. § 546.4 (1991), and its assets and liabilities could be transferred to a bank in a purchase and assumption transaction. *See id.* *See also* OTS Corporate and Securities Division Opinion No. 91/CS-05 (Mar. 25, 1991), [Current] Fed'l Banking L. Rep. (CCH) ¶ 82,500 (approving an application by a state savings association to convert to a state bank charter); J. Williams, *supra* note 93, § 8.02 (discussing conversions of savings associations to banks).

196. *See* FIRREA, *supra* note 1, § 206(a)(7), 12 U.S.C. § 1815(d)(3)(A) (Supp. I 1989).

197. *See id.*

198. *See generally* *Accounting for Acquisitions of Thrifts by National Banks*, *supra* note 162, at App. B (describing different filing and approval requirements depending on the structure used to consummate the Oakar consolidation). For instance, assume that the target savings association is a federal stock savings association and that it is to be converted to an interim national bank, which is then to be merged into an existing bank subsidiary of the bank holding company. In addition to the approvals specifically required by the Oakar Amendment, the OTS must approve the conversion. The OCC must grant a charter for the interim national bank and approve of the savings association conversion to a national bank. The federal banking regulator of the resulting bank must approve a Bank Merger Act application for the merger of the interim national bank into the existing bank subsidiary. Finally, the Federal Reserve Board must approve the bank holding company's acquisition of the additional interim national bank subsidiary. If a state institution is involved, applications to and approvals from the state banking or savings association regulator are also required. *See* OTS Chief Counsel Opinion No. 90/CC-18, *supra* note 195; Norwest Corp., 76 Fed. Res. Bull. 873, 874 n.2 (1990) (use of an interim bank "does not appear to cause an otherwise qualifying transaction to fall outside the bounds of the Oakar Amendment").

Under an alternative structure of the Oakar consolidation, the bank holding company might establish an interim savings association subsidiary to purchase the assets and to assume the liabilities of the target savings association and then plan for the existing bank subsidiary to effect a purchase and assumption transaction with the interim savings association subsidiary. The OTS or state authority must charter the interim savings association. The bank holding company must apply to the Federal Reserve Board for

from the announcement of an Oakar transaction to its final consummation after receipt of all regulatory approvals can easily take one year. Understandably, some bank holding companies may be waiting on the sidelines to observe how other acquisitions are structured and to wait for the regulatory approval process to be streamlined.

The Oakar Amendment also contains several unnecessary requirements, one of which—the capital limitation provision—has now expired.¹⁹⁹ The deposits attributed to the former savings association are assumed to grow at a minimum seven percent annual rate, and SAIF deposit insurance must be paid on this increasing deposit base. Prior to the equalization of SAIF and BIF deposit insurance rates, the unrealistic growth rate upon which the more expensive SAIF deposit insurance was based may have been a factor in discouraging some Oakar consolidations. A remaining problem with the Oakar Amendment is the requirement that the depository institution subsidiaries of the bank holding company proposing an Oakar consolidation have assets that are twice the size of the savings association to be acquired.²⁰⁰ The Federal Reserve Board has indicated that the assets of the savings association to be acquired may be counted in determining the assets of the acquiring bank holding company.²⁰¹ Nevertheless, the requirement precludes bank holding company acquisitions of savings associations that are still too large with respect to the bank holding company acquirer.

Finally, acquisitions of marginal, but still solvent, savings associations may have been affected by the cross-guarantee provision added in FIRREA to the Federal Deposit Insurance Act. If the target savings association is in a weak financial position, a bank holding company may be unwilling to take the risk that the thrift assets are worth even less than expected.²⁰² If a bank holding company structures a thrift acquisition as an Oakar transaction and merges the acquired thrift into an existing bank subsidiary, the resulting bank subsidiary would realize any losses suffered as a result of any poor thrift assets purchased. If the combina-

permission to acquire the interim savings association as a nonbanking subsidiary. The bank holding company may also have to file an application for approval to purchase the interim savings association pursuant to the Savings and Loan Holding Company Act. A Bank Merger Act application must be made for the consolidation of the interim savings association and the bank subsidiary. Finally, the OTS must approve of the dissolution of the interim savings association.

199. See *supra* note 97 and accompanying text.

200. See FIRREA, *supra* note 1, § 206(a)(7), 12 U.S.C. § 1815(d)(3)(E)(i) (Supp. I 1989); see *supra* text accompanying note 93.

201. See *supra* note 93.

202. Bank holding companies also structure proposed acquisitions with escape clauses in the event that the assets of the target institution are not as valuable as when the acquisition was announced. See Moore & Murphy, *supra* note 115, at 24 ("We think bank holding companies will be hesitant to guarantee the health of an acquired thrift at the expense of a bank subsidiary."); Sanchez, *Cancellation Rate Climbs in the 3d Quarter*, Am. Banker, Oct. 31, 1990, at 21 (many pending acquisitions are being terminated because of "clauses in contracts that allow buyers to terminate an agreement on the basis of deficiencies in balance sheet quality").

tion of the thrift and bank sufficiently weakens the bank subsidiary, it is possible that the Federal Reserve Board may attempt to exercise its "source of strength" regulation and require that the bank holding company make any necessary infusions of capital into the ailing bank subsidiary.²⁰³

Losses suffered by an acquired thrift could seemingly be insulated from the assets of a bank subsidiary if the bank holding company acquired the savings association and held it as a separate subsidiary.²⁰⁴ The cross-guarantee provision that FIRREA added to the Federal Deposit Insurance Act, however, eliminates this advantage of the separate corporate form by requiring that each depository institution guarantee the FDIC for any losses it suffers as a result of any commonly controlled depository institution.²⁰⁵ Thus, retaining a separate corporate form for the thrift institution will not shield the assets of other commonly controlled depository institutions from losses the thrift subsidiary may cause for the FDIC.

Although the FDIC may waive the cross-guarantee if necessary to facilitate a proposed acquisition,²⁰⁶ once it is waived the thrift subsidiary is no longer treated as a sister bank of the other depository institution subsidiaries for purposes of the exemption to the affiliate transaction restrictions of the Federal Reserve Act.²⁰⁷ The perverse effect of the cross-guarantee provision on the FIRREA provisions, whose objective is to attract bank holding company capital to thrift institutions, is that if the proposed thrift target is only marginally solvent, the bank holding company may find it more cost-effective to wait for the thrift to become insolvent and to purchase a select portion of its assets from the RTC than to purchase it prior to its insolvency in a private transaction without government assistance.²⁰⁸

203. See 12 C.F.R. § 225.4(a)(1) (1991) ("A bank holding company shall serve as a source of financial and managerial strength to its subsidiary banks"); 52 Fed. Reg. 15,707 (1987) (Federal Reserve Board "source of strength" policy statement). But see *MCorp Fin., Inc. v. Board of Governors*, 900 F.2d 852 (5th Cir. 1990) (holding that the Federal Reserve Board's source of strength regulation exceeded its statutory authority), *cert. granted*, 111 S. Ct. 1101 (1991).

204. See FIRREA, *supra* note 1, § 601(a), 12 U.S.C. § 1843(i) (Supp. I 1989).

205. See *id.* § 206(a)(7), 12 U.S.C. § 1815(e); *supra* notes 166-68 and accompanying text.

206. See FIRREA, *supra* note 1, at § 206(a)(7), 12 U.S.C. § 1815(e)(5)(A) (Supp. I 1989); see also 55 Fed. reg. 21,934, 21,935 (1990) (FDIC policy on cross-guarantee provision).

207. See *id.* § 206(a)(7), 12 U.S.C. § 1815(e)(5)(B) (Supp. I 1989).

208. See Klinkerman, *supra* note 167 ("Acquirers will protect themselves by withholding bids until weak institutions fail and get federal assistance, experts predict."). Another detriment of the provision is that creditors of bank holding companies may no longer rely on any stock of healthy bank subsidiaries as collateral for bank holding company debt. See *id.*; Doyle & DeSimone, *supra* note 39 ("A potential acquiror should carefully consider the impact of the cross-guarantee provision on any acquisition, particularly of a financially weak or undercapitalized savings association, since the acquisition may affect the debt rating of affiliated banks and the ability of the parent or any affiliated banks to raise equity capital."); Huggins, *supra* note 146.

IV. EVALUATION OF THE CONGRESSIONAL OBJECTIVE AND PROPOSALS FOR IMPROVEMENT

The goal of the FIRREA provisions permitting bank holding companies to acquire savings associations is to attract bank holding company capital to savings associations which, absent an infusion of capital, might fail and be subject to government resolution at taxpayer expense.²⁰⁹ Reducing government, and ultimately taxpayer, expense resulting from the savings and loan crisis is obviously a worthy objective. Attracting bank holding company capital to savings associations is one way of achieving this objective, assuming that the bank holding company capital infused into the savings association is sufficient to prevent it or the resulting bank from becoming insolvent.

It is natural for Congress to look to bank holding companies as a possible source of the additional capital badly needed by the thrift industry. The operation of thrift institutions is closely related to banking, as the Federal Reserve Board stated as early as 1977,²¹⁰ and FIRREA's explicit authorization of bank holding company ownership of thrifts was long overdue.²¹¹ Bank holding companies have the expertise necessary to operate a savings association as a separate subsidiary or to combine the operations of a savings association with an existing bank subsidiary in an Oakar transaction. The fact that Oakar combinations of savings associations and banks have been successful also highlights the similarity of these once distinct businesses.

Further, because of other changes FIRREA made in the regulation of savings associations, bank holding companies may be the only entities capable of purchasing savings associations without serious jeopardy to their preexisting operations.²¹² It is possible for a company that is not a bank holding company to purchase a savings association.²¹³ The company would then become a savings and loan holding company and, pursuant to the Savings and Loan Holding Company Act, would be allowed under certain conditions to operate other businesses not related to banking.²¹⁴ FIRREA, however, amended the qualified thrift lender ("QTL") test to provide that a savings association that does not meet the new QTL

209. See *supra* text accompanying notes 9-10.

210. See *supra* text accompanying note 20.

211. See Broome, *supra* note 28, at 847-49 (urging Congress to permit bank holding company acquisitions of healthy thrift institutions).

212. Representative Oakar proposed an amendment to the bank reform legislation currently being considered by the House Banking Committee that would permit banks, thrifts, and nonbank banks not owned by bank holding companies to conduct an Oakar transaction. See also H.R. 379, 102d Cong., 1st Sess. (1991) (a bill sponsored by Rep. Oakar proposing a similar change in the Oakar consolidation mechanism). H.R. 6, 102d Cong., 1st Sess. §§ 423-25 (1991); H. Rep. No. 157, 102d Cong., 1st Sess. 32 (1991).

213. See MacRae, *supra* note 8, at 34. See generally Vartanian, Schechter, Ansell & Wald, *Thrift Acquisitions by Industrial Companies in the Post-FIRREA Environment*, Banking Expansion Rep., June 5, 1989, at 1.

214. See 12 U.S.C. § 1467a(n) (Supp. I 1989). A savings and loan holding company owning only a single savings and loan subsidiary may engage in any other commercial

test by devoting seventy percent of its assets to specifically designated home mortgage assets would be deemed a bank and would be regulated like a bank for all purposes.²¹⁵ As the owner of a bank, the former savings and loan holding company would be considered a bank holding company and would be subject to the Bank Holding Company Act's more stringent limitations on the business operations of the holding company's other subsidiaries, precluding all activities not closely related to banking and a proper incident to banking.²¹⁶ Thus, while FIRREA increased the potential range of savings association owners by permitting bank holding companies to acquire healthy thrift institutions, it decreased the desirability and feasibility of thrift ownership for all other business enterprises.

The benefits of attracting additional capital to the savings association industry from bank holding companies and other enterprises seem obvious. If a savings association's own capital is insufficient to support its long-term operations, it will be disposed of upon its eventual insolvency only after governmental intervention and substantial taxpayer cost.²¹⁷ Moreover, as discussed in Part III, the bank holding company should benefit from a savings association acquisition that results in a cost-effective expansion of its market share.²¹⁸

Furthermore, the possible detriments of attracting bank holding company capital to savings associations do not outweigh the benefits identified above. The FIRREA provisions do not compel savings associations to end their separate existence and assent to bank holding company acquisitions. A solvent savings association with adequate capital may successfully resist takeover efforts by a bank holding company and continue its operations as a thrift institution. To the extent that savings associations consent to Oakar acquisitions by bank holding companies, the savings associations do, of course, lose their separate existence as they become absorbed by the bank holding companies and their existing bank subsidiaries.²¹⁹

It is not necessary, however, to preserve the thrift industry separate from the banking industry to ensure that the banking and borrowing needs traditionally filled by thrifts continue to be met.²²⁰ Thrift institutions were originally developed in this country to provide home mortgage

activity so long as the savings association subsidiary is substantially engaged in residential lending activities.

215. See *supra* text accompanying notes 144-45.

216. See 12 U.S.C. § 1843(c)(8) (1988).

217. See *supra* text accompanying notes 2-8.

218. See *supra* text accompanying notes 122-26.

219. See Bush, *supra* note 124, at 35 (suggesting that bank acquisitions of thrifts will accelerate the breakdown of distinctions between different types of financial institutions).

220. See 135 Cong. Rec. S10,196 (daily ed. Aug. 4, 1989) (statement of Sen. Bradley) ("As long as the demand for housing exists, financial institutions will provide funding"); Svare, *supra* note 123, at 14 ("A number of banking experts . . . do not expect the thrift industry to survive in its current form. The need for size and scale will predominate.").

financing²²¹ because banks, especially national banks, had only limited real estate lending powers.²²² These restrictions were largely eliminated by legislative changes in the early 1980s, and many banks have since found home mortgage lending to be a profitable aspect of their loan portfolio. Banks currently provide approximately one-half of all housing finance.²²³ To the extent that thrifts are consolidated into banks owned by bank holding companies, the resulting banks have the necessary expertise to continue the primary thrift function of the origination of home mortgage loans.

Although thrift institutions were legislatively granted the ability to diversify their loan portfolios with shorter-term loans (such as consumer loans) in the early 1980s,²²⁴ FIRREA's QTL test demands concentration in home mortgage lending.²²⁵ Banks thus enjoy a significant portfolio advantage over thrifts because of their ability to structure diversified loan portfolios that are better able to absorb interest rate fluctuations, whereas thrifts are required to maintain a high level of concentration in home mortgage lending.²²⁶ Moreover, the secondary market in home mortgage loans has developed considerably in the last decade. Home mortgage loans may be securitized and sold to investors who, unlike banks or thrifts whose assets are funded by relatively short-term deposit liabilities, have a longer-term investment horizon.²²⁷ Mortgage finance companies also currently fill a great deal of the home mortgage lending demand.

Critics argue that home mortgage borrowers will suffer as the result of

221. Long, Schilling & Van Cleef, *Enhancing the Value of the Thrift Franchise: A Possible Solution for the Dilemma of the FSLIC?* 37 Cath. U.L. Rev. 385, 389 (1988) (S&Ls were formed "to provide a group of individuals with the means to pool their savings through small, regular contributions, with the intent of providing each member with an opportunity to borrow from the pool to finance the purchase of a house").

222. See Huber, *FIRREA: Requiem for the Thrift Industry*, 44 Consumer Fin. L.Q. Rep. 74, 80 (1990). State chartered banks have traditionally participated in home mortgage lending, but national banks were prohibited by the National Bank Act of 1864 from offering home mortgage loans until 1916. See B. Klebaner, *Commercial Banking in the United States: A History* 79 (1974). Thirty-year home mortgage loans were not permitted for national banks until 1970. See Emergency Home Finance Act of 1970, Pub. L. No. 91-351, § 704, 34 Stat. 462 (current version codified at 12 U.S.C. § 371 (1988)).

223. See 56 Banking Rep. (BNA) 867, 867 (1991) ("the thrift industry has become less important as a provider of housing finance"; at the end of 1981, "thrifts held only about 20 percent of all mortgage-backed securities").

224. See Broome, *supra* note 28, at 801-04.

225. See 12 U.S.C. § 1467a(m) (Supp. I 1989); *supra* text accompanying notes 144-45.

226. See Scott, *supra* note 9, at 1894, 1898 (because they had greater portfolio diversification than S&Ls, banks suffered far fewer failures and losses than S&Ls in the 1980s); 56 Banking Rep. (BNA) 867, 867 (1991) ("a stricter QTL test would leave the [thrift] industry vulnerable to economic cycles"); see also Pringle, *supra* note 61, at 202 (the FIRREA QTL test "may be a substantial deterrent to thrift acquisitions which result in thrift institutions remaining in existence as opposed to being converted or merged, because the earnings potential of thrifts is limited by the imposition of restrictions on 'qualified thrift investments' and 'portfolio assets'").

227. 56 Banking Rep. (BNA) 867, 867 (1991) ("the development of mortgage backed securities has lowered the demand for housing finance from thrifts since those securities separate mortgage lending into origination, holding, and servicing").

consolidation of the thrift and bank industries. If some thrift branches are eliminated upon the thrift's consolidation into a bank, home mortgage borrowers may be inconvenienced. If banks have more profitable lending opportunities, the use of thrift deposits to fund home mortgage loans may be diverted to other lending purposes. If demand for home mortgage loans outpaces a declining supply of funds for that purpose, mortgage interest rates will increase. One of the greatest fears of those opposed to financial industry consolidation, however, is that local control over local deposits will end as bank holding companies divert local savings association deposits to other uses in the holding company structure and outside the savings association's market area.

These arguments against consolidation of thrifts and banks are not convincing. Savings association branches that overlap with the branches of a bank into which the savings association is consolidated will no doubt be eliminated for reasons of operating efficiency. This elimination of branches, however, should benefit the customers of the new bank subsidiary because it will result in decreased branch operation costs. Competitive considerations in a customer service business, moreover, will ensure that customers will continue to be served by convenient branch locations. Bank-thrift consolidations are subject to antitrust review under the Bank Merger Act and combinations that would result in a substantial lessening of competition in the relevant market will not be approved.²²⁸

Although it is possible that, at least in the short run, the deposits of the former savings association may be diverted from home mortgage loans to other initially more profitable lending opportunities, in the long run this diversion may help to ensure the profitability of the bank holding company and its continuation as a provider of basic financial services.²²⁹ If the supply of funds available for home mortgage lending decreases, the interest rate earned on home mortgages should increase.²³⁰ The increased profit opportunities will attract some funds back into the home mortgage lending market. It certainly cannot be argued that it is good long-term policy for savings associations to offer low-cost home mortgage loans that are not profitable for the savings association.²³¹

Further, it is unlikely that local control over local deposits will be lost upon consolidation of a savings association into a bank. As previously

228. See 12 U.S.C. § 1828(c) (1988).

229. See Nagle, *supra* note 143 ("In-market consolidation will reduce competition, thereby allowing survivors to increase prices and to decrease unit costs.").

230. See MacRae, *supra* note 8, at 34 (mortgages "may become more expensive relative to interest rate levels because of the elimination of desperate competitors"); Nagle, *supra* note 143.

231. In one bank holding company's view, the thrift that it acquired had "conceded to competitive pressures by underpricing mortgage loan products with unrealistic teaser rates and free options letting the borrower convert ARMs to fixed-rate loans." Sanchez, *supra* note 202. Upon acquisition of the thrift, the bank holding company "immediately rationalized mortgage pricing, thereby increasing profitability, reducing mortgage loan demand, and freeing funds for other profitable uses." *Id.*

indicated, most bank holding companies are attracted to savings associations in their existing market.²³² Expansions by bank holding companies through the acquisitions of savings associations in new markets are relatively rare. Even in such cases, however, the recent community bank movement again demonstrates that customer demand for local institutions satisfying local lending needs will ensure that such needs continue to be met. Moreover, the Community Reinvestment Act provides some assurance that local borrowing needs will be served.²³³

Although there are compelling arguments in favor of permitting bank holding company acquisitions of savings associations as a means of attracting private capital to the thrift industry, the substantial financial risks to bank holding company acquirers of such acquisitions must also be considered. The financial risks to a bank holding company and its bank subsidiaries that may be a party to an Oakar consolidation may be quite serious if the acquired savings association proves to be less valuable than expected. A bank holding company, therefore, may be unwilling to effect an Oakar transaction and expose the earnings of its bank subsidiary to the losses that may be occasioned by bad loans from the target savings association. The holding company itself faces potential liability if the Federal Reserve Board successfully applies its source of strength regulation to make the holding company responsible for any additional capital needed by the bank subsidiary.²³⁴

The acquisition of a weak savings association and operation of it as a separate thrift subsidiary without an Oakar consolidation into a bank subsidiary will also not protect the operations of the bank subsidiaries from losses that may be realized in the separate thrift subsidiary. The cross-guarantee provision added by FIRREA to the Federal Deposit Insurance Act puts the assets of commonly-controlled bank subsidiaries at risk should the savings association subsidiary become insolvent and cause losses for the FDIC.²³⁵ Given the risk that the acquisition of a weak savings association poses to the bank subsidiary's profits, many bank holding companies may find it advantageous to wait for a marginal target savings association to be taken over by the RTC, and then arrange an expedited transfer on favorable terms from the RTC. Thus, the cross-guarantee provision may operate to discourage bank holding company purchases of marginal savings associations, presumably the group of institutions that would benefit most from an infusion of bank holding company capital and the group of institutions that present the greatest risk of becoming insolvent and having to be resolved at taxpayer expense.

On balance, the potential savings to the government and ultimately to

232. See *supra* text accompanying note 122-23 and note 146.

233. See 12 U.S.C. §§ 2901-06 (1988 & Supp. I 1989).

234. See *supra* note 203 and accompanying text.

235. See Moore & Murphy, *supra* note 115, at 24 ("we think bank holding companies will be hesitant to guarantee the health of an acquired thrift at the expense of a bank subsidiary"); *supra* notes 204-05 and accompanying text.

the taxpayers resulting from encouraging private bailouts of savings associations seem worth any changes in the structure of the financial services industry that may result from bank holding company acquisitions of thrifts. Thus, if the goal of attracting bank holding company capital to solvent thrifts identified in FIRREA is a goal worth achieving, it is important to explore ways to encourage greater use of the private resolution method.

One obvious way to make savings association acquisitions more attractive to bank holding companies is to attempt to reduce the financial risks of these acquisitions occasioned by the possible application of the Federal Reserve Board's source of strength regulation and the FDIC's cross-guarantee provision. This, however, is an area requiring further thought and study. For instance, consideration should be given to whether the cross-guarantee provision should be eliminated, whether the FDIC should freely waive its application in the case of the purchase of a marginal thrift without the imposition of any further conditions and without the loss of the sister bank exemption from the affiliate transaction rules, and whether there may be some other mechanism to protect the FDIC from the abuses that the cross-guarantee provision was designed to end without inhibiting marginal thrift acquisitions.²³⁶ Congress is currently considering legislative proposals that would add the Federal Reserve Board's source of strength regulation²³⁷ to the federal banking statutes, thereby eliminating the argument that the regulation exceeds the Board's statutory authority.²³⁸

In Part III, several other reasons were offered for the lack of additional acquisitions of solvent thrifts by bank holding companies.²³⁹ One of the possible explanations was the general slowdown in acquisition activity occasioned by the recessionary economy.²⁴⁰ Thus, we should expect that, as the economy improves, acquisition activity, including bank holding company acquisitions of thrifts, will increase.

A second factor was the increased attraction, since FIRREA, of bank holding companies to savings associations sold by the RTC in government-assisted transactions.²⁴¹ It is not suggested that private acquisitions be made more attractive by reducing the desirability of insolvent institution purchases. Indeed, the RTC should be encouraged to streamline these acquisitions as much as possible to facilitate quick purchase and minimize the time of government ownership and operation. What should be encouraged, however, are private acquisitions of marginal sav-

236. See 56 Banking Rep. (BNA) 1144, 1144 (As of March 1, 1991, there were 2,283 thrifts in the private sector compared with 2,342 thrifts at the end of 1991. Three hundred seventy-eight of the thrifts were classified as having poor earnings and low capital, and an additional 164 institutions are considered in even worse condition.).

237. See *supra* note 203.

238. See H.R. 6, 102d Cong., 1st Sess. § 601 (1991).

239. See *supra* text accompanying notes 192-201.

240. See *supra* text accompanying notes 193-94.

241. See *supra* text accompanying note 192.

ings associations. It is reported that the RTC may sometimes require potential purchasers of marginal but solvent thrifts, for which no conservator or receiver has yet been appointed, to participate in a formal bidding process for the target savings association. Although a bidding process may appear to achieve a higher price for an institution than a privately arranged acquisition, there is little doubt that the bidding process discourages easy and quick dispositions. If a potential bank holding company acquirer and a solvent savings association have reached agreement on an acquisition, the RTC should not interfere with the private transaction, even if it feels a better price for the savings association could be obtained from other potential acquirers.

It is also possible that the objective of attracting capital to the thrift industry could be better achieved through some modest reform of the current statutory scheme set forth in FIRREA.²⁴² For instance, the Oakar Amendment which is currently located in the Federal Deposit Insurance Act, should be recodified in or cross-referenced in the Bank Holding Company Act, where it logically belongs.

The regulatory review and approval process associated with the Oakar Amendment should also be streamlined. Direct statutory authority should be provided for a savings association to convert to a national bank charter.²⁴³ The regulatory applications and approvals currently required should be eliminated in favor of approval from the federal banking regulator of the resulting bank, who should be charged with ensuring that the resulting bank is safe and sound.

The OTS has little interest in an Oakar transaction so long as the FDIC's SAIF fund continues to receive deposit insurance premiums based on the former savings association's deposits. The FRB in its capacity as regulator of bank holding companies and their nonbanking subsidiaries also has little interest in approving a transaction that affects only a banking subsidiary of the bank holding company. Eliminating duplicative, time-consuming and expensive federal regulatory review would reduce the costs associated with Oakar transactions and increase their attractiveness to bank holding companies.

In addition, whatever regulator is charged with review and approval of the Oakar transaction should do so on an expedited basis. Time is crucial to preserving the value of the target savings association and encouraging private rather than government bailouts of marginal institutions. Unless a savings association is insolvent and the RTC has been appointed a conservator or receiver of the institution, the RTC should not interfere

242. See H.R. 379, 102d Cong., 1st Sess. (1991) (a bill sponsored by Rep. Oakar to modify the Oakar transaction).

243. See *supra* text accompanying notes 196-98. Representative Oakar has proposed a bill that would provide direct merger authority for a savings association - bank conversion and would also provide for an expedited review process. See H.R. Rep. 379, 102d Cong., 1st Sess. (1991).

with a proposed private acquisition by requiring that bids for the marginal institution be solicited from other potential acquirers.

Some of the seemingly arbitrary requirements of the Oakar Amendment should also be eliminated or revised. Fortunately, the capital limitation provision is eliminated as of August 1, 1991.²⁴⁴ The Oakar Amendment further requires that the bank holding company party to the Oakar transaction be twice the size of the savings association party.²⁴⁵ The legislative history of the provision provides no justification for this seemingly arbitrary requirement, and it should also be eliminated. The Oakar Amendment assumes that the former SAIF deposits will grow at a minimum annual rate of seven percent, and SAIF deposit insurance premiums are assessed on this basis.²⁴⁶ Although the economic consequences of this unrealistic assumption are not as severe after the equalization of SAIF and BIF deposit insurance premiums on July 1, 1991, it should also be removed.²⁴⁷

More significantly, the greatest financial disincentive to an Oakar transaction with a healthy savings association is the recapture of the savings association's bad debt reserve upon its conversion to a bank. Elimination of the recapture, or a phased-in recapture period over the course of several years, might make savings associations more attractive to bank holding companies wishing to consolidate a savings association with a bank subsidiary.²⁴⁸

CONCLUSION

Congress and the bank and thrift regulators should carefully consider the changes proposed in this Article to further encourage the commitment of bank holding company capital, rather than government and taxpayer resources, to the purchase of savings associations.²⁴⁹ Even without

244. See *supra* text accompanying note 97. This provision was problematic because the statute was not clear as to when the capital requirement had to be satisfied—at the time the acquisition of the savings association was announced, or at the time the Oakar consolidation was consummated.

245. See *supra* text accompanying note 93 and notes 200-01.

246. See *supra* note 88 and accompanying text.

247. The seven percent growth rate for SAIF deposits still affects the amount of SAIF deposits upon which the SAIF exit fee will be assessed if the bank attempts to convert the SAIF deposits to the BIF fund upon the expiration of the deposit insurance conversion moratorium.

248. See, e.g., 56 Banking Rep. (BNA) 747 (1991) (the chairman of the U.S. League of Savings Institutions urged the House Banking Financial Institutions Supervision, Regulation, and Insurance Subcommittee to permit thrifts to convert to commercial banks without having to pay taxes on their bad debt reserves); 56 Banking Rep. (BNA) 680 (1991) (a savings bank official urged Congress to eliminate the requirement that a thrift's bad debt reserve be recaptured and taxed upon the thrift's conversion to a bank); 56 Banking Rep. (BNA) 63 (1991) (the "most important barrier" to a thrift's conversion to a commercial bank charter is recapture of the thrift's bad debt reserve).

249. The OTS recently announced that it is developing an open assistance plan to help rehabilitate troubled, but still solvent, savings associations. See 56 Banking Rep. (BNA) 1144 (1991). Pursuant to this plan, a combination of private capital and government

these proposed statutory modifications there are numerous advantages to an Oakar transaction for a bank holding company, especially if the savings association target is still organized as a mutual institution. The Oakar Amendment provides a mechanism for the current consolidation of the bank and thrift industries and thus represents a step towards greater consolidation of depository institutions.

assistance would be used in an effort to save additional taxpayer money. The plan has not yet been adopted as official government policy by the OTS or the FDIC. *Id.*